Supreme Court, U.S.
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No. 06-543

In the Supreme Court of the United States

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION, ILLINOIS BELL TELEPHONE COMPANY d/b/a/ SBC ILLINOIS, VERIZON NORTH, INC. and VERIZON SOUTH, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether a local telephone carrier, that has been found to be in violation of the FCC's orders requiring the provision of network services to independent payphone providers at cost-based rates that comply with the new services test under Section 276 of the Communications Act of 1934, must refund the amount charged in excess of the lawful rate.

PARTIES TO THE PROCEEDING

The petitioner, appellant below, is the Illinois Public Telecommunications Association.

The respondents, appellees below, are the Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc. f/k/a GTE North, Inc., and Verizon South, Inc. f/k/a GTE South, Inc.

RULE 29.6 STATEMENT

The Illinois Public Telecommunications Association is an Illinois not-for-profit corporation that is not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois Public Telecommunications Association respectfully petitions for certiorari to the Illinois Appellate Court, First District, in Illinois Public Telecommunications Association v. Illinois Commerce Commission, No. 1-04-0225.

OPINIONS BELOW

The opinion of the Illinois Appellate Court is unpublished and is reproduced at App. 1a - 15a. The relevant order of the Illinois Commerce Commission is unpublished and is reproduced at App. 16a - 113a.

JURISDICTION

The Illinois Appellate Court issued its order on November 23, 2005. A petition for leave to appeal to the Illinois Supreme Court was denied on May 24, 2006. Petitioner's motion for leave to file a motion to reconsider the order denying the petition for leave to appeal was filed on June 14, 2006. Petitioner's motions to supplement the motion to reconsider were granted on July 5, 2006 and July 11, 2006. The motion to reconsider was denied on July 20, 2006. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

RELEVANT STATUTORY PROVISIONS

Relevant statutes appear in the Appendix.

STATEMENT OF THE CASE

This case represents an important question of federal law on which twelve states and one United States Court of Appeals have reached conflicting determinations, affecting twenty three states, as to the application of the Communications Act of 1934, amended by the Telecommunications Act of 1996 ("1996 Act"), and the orders of the FCC. The instant decision of the Illinois Appellate Court, together with

decisions made in four other states, stand in direct conflict with the recent decision of the United States Court of Appeals, Ninth Circuit,[1] and the decisions in seven different states, and also stands in conflict with this Court's decisions on the application of the filed rate doctrine.

A. Background of Federal Proceedings

Through the passage of the 1996 Act, Congress directed the Federal Communications Commission ("FCC") to prescribe a set of nonstructural safeguards, at least equal to those adopted in the FCC's Computer Inquiry-III (CC Docket No. 90-623) proceeding, that would ensure that any Bell operating company[2] that provides payphone service (1) does not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations, and (2) does not prefer or discriminate in favor of its payphone service. 47 U.S.C. §276(b)(1)(C). Another part of the payphone regime required by Congress directed the FCC to establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. 47 U.S.C. §276(b)(1)(A). Pursuant to this Congressional directive, the FCC issued a series of

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[1] *Davel Communications, Inc. v. Qwest Corporation*, 460 F.3d 1075 (9th Cir. 2006) reversed the dismissal of a complaint by payphone service providers seeking refunds from Qwest Corporation, regarding its Bell operating company operations in eleven states, for violating the 1996 Act and FCC orders.

[2] The term "Bell operating company" is defined in the 1996 Act. Respondent Illinois Bell Telephone Company ("Illinois Bell") is one of the companies listed in the statutory definition. 47 U.S.C. §153(4).

orders and regulations to implement these and other requirements of the national payphone regime required by Section 276 of the 1996 Act.

On September 20, 1996, the FCC held that Sections 276(a) and 276(b)(1)(C) of the 1996 Act required incumbent local exchange carriers ("LECs"), including Illinois Bell and Verizon[3], to provide local telephone network services to competing independent payphone providers at cost-based rates that comply with the FCC's new services test adopted in the FCC's Computer Inquiry-III. Incumbent LECs were required to file tariffs with the FCC reflecting cost-based rates that complied with the new services test. All inconsistent state rate requirements were expressly preempted pursuant to Section 276(c). *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 F.C.C.R. 20541, ¶¶ 146-147 (1996) ("*First Payphone Order*"). The FCC also determined that incumbent LECs would be eligible to receive compensation from long distance carriers for completed toll free and access code calls that originated from the incumbent LECs' payphones ("dial-around compensation"), pursuant to Section 276(b)(1)(A), within one year from the April 15, 1997 date on which the FCC rules would take effect. *First Payphone Order*, ¶ 50.

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[3] Respondents Verizon North, Inc. and Verizon South, Inc. were formerly known as GTE North, Inc. and GTE South, Inc., respectively. They will be collectively referred to herein as "Verizon".

At the request of Illinois Bell[4], Verizon, and other incumbent LECs on reconsideration, the FCC modified its previous order and held that an incumbent LEC could become eligible to receive dial around compensation for its payphones earlier than as stated in the *First Payphone Order*, provided it could certify that it had completed all of the requirements for implementing the other provisions of Section 276, including the requirement for the provision of network services to independent payphone providers at cost-based rates. The FCC made eligibility for dial around compensation expressly contingent upon a LEC's compliance with the other requirements of Section 276, to ensure their enforcement. *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 F.C.C.R. 21233 (1996), ¶¶130 - 131 *("Payphone Reconsideration Order")*. Also, the FCC agreed that the LEC tariffs for cost-based rates to independent payphone providers should be filed with the state. These tariffs were required to be filed no later than January 15, 1997 and effective no later than April 15, 1997. The FCC directed that the states should apply the federal requirements in tariffing intrastate services, and stated that the FCC would rely on the states to ensure that the basic payphone line is tariffed in

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[4] Illinois Bell was represented by its parent corporation, then known as Ameritech, later known as SBC, and now known as AT&T. Throughout the period of this proceeding, Illinois Bell has been doing business as either Ameritech Illinois, SBC Illinois, or, now, AT&T Illinois. To avoid confusion, the petitioner continues to refer to Illinois Bell's assumed name as SBC Illinois, which was the name in use through most of the proceeding.

accordance with the requirements of Section 276. However, the FCC provided for the filing of tariffs at the FCC should a state be unable to review such tariffs. *Id.*, ¶163. These orders were affirmed on appeal. *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *petitions for review denied in part, granted in part on other grounds, clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998).

On April 4, 1997, acting through the Common Carrier Bureau, the FCC reiterated the requirement that incumbent LECs must have cost-based rates to independent payphone providers in effect by April 15, 1997 to be eligible to receive dial around compensation. Order, DA 97-678, 12 F.C.C.R. 20997 (Com Car. Bur. Released April 4, 1997) ("*Bureau Waiver Order*"). Illinois Bell and other incumbent LECs then petitioned the FCC for additional time to file effective intrastate tariffs that complied with the new services test. The Common Carrier Bureau granted all incumbent LECs a limited waiver extending the deadline to May 19, 1997 to file compliant intrastate tariffs provided (1) they were in compliance with the other requirements of the *Payphone Reconsideration Order* and (2) the LECs reimburse payphone providers back to April 15, 1997 in instances where the cost-based tariffs, when effective, are lower than the previously existing rates. Those incumbent LECs that filed intrastate tariffs within the limited waiver period would be eligible to receive dial around compensation beginning April 15, 1997. Order, DA 97-805, 12 F.C.C.R. 21370 (Com. Car. Bur. Released April 15, 1997) ("*Bureau Clarification Order*").

After incumbent LECs self-certified their compliance with the FCC's Section 276 requirements, they began billing long distance carriers for dial around compensation for completed calls made from LEC payphones. A number of long distance carriers refused to pay the compensation on the basis that, despite the LEC's self-certification, they were not in actual compliance with the FCC's requirements for intrastate rates, and therefore were not eligible to receive dial around compensation. Upon complaint, the Common Carrier Bureau found that the long distance carriers were required to pay dial around compensation to a LEC once it had certified that it had complied with the Section 276 requirements pursuant to the FCC's orders. The Bureau made it clear that although self-certification did not substitute for a LEC's actual compliance to be eligible for compensation, the question of actual compliance is a determination that must be made by the FCC or a state commission. *Bell Atlantic-Delaware v. Frontier Communications Services*, 1999 WL 754402, DA 99-1971, ¶28 (Com. Car. Bur. released September 24, 1999).

In an order clarifying the requirements of the new services test, the FCC found that the requirement for cost-based rates for the provision of network services to independent payphone providers only applied to the Bell operating companies, as defined in the 1996 Act, and not as to all incumbent LECs.[5] It

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[5] Petitioner has requested refunds from Verizon, a non-Bell operating company in Illinois, for the excess charges collected between April 15, 1997 and January 31, 2002, the date of the *FCC Wisconsin Order*. The request is based on Verizon's collection of dial around compensation during this time period, for which the tariffing of cost-based rates was a precondition for eligibility

further clarified the application of the new services test to be applied by the states in enforcing the Section 276 requirements, rejecting the LEC argument that it is sufficient to charge payphone providers rates equivalent to business rates. *In the Matter of Wisconsin Public Service Commission*, 17 F.C.C.R. 2051, 2060, 2068 - 69 (2002) ("*FCC Wisconsin Order*"), *affirmed sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D. C. Cir. 2003).

B. Illinois Proceedings

Prior to the 1996 Act, the Illinois Commerce Commission ("ICC") had reviewed Illinois Bell and Verizon's rates for the services provided to independent payphone providers and had approved non-cost-based rates in accordance with the Illinois Public Utilities Act requirements that rates be just and reasonable.[6] 220 ILCS 5/9-101. Illinois had no requirement for these rates to be cost based and no determination was made as to whether they complied with the FCC's new services test.

On May 15, 1997 Illinois Bell filed cost studies with the ICC and self-certified that its existing tariffed rates for network services provided to independent payphone providers satisfied the FCC's new services

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under the FCC's Orders pursuant to Section 276(b)(1)(A). Since the Illinois Appellate Court found there were no refunds due from any LEC, it did not reach the issue of Verizon's particular liability.

[6] *GTE North Incorporated Proposed Filing to Restructure and Consolidate Local Exchange, Toll and Access Tariffs of the Former Contel of Illinois, Inc.*, Docket Nos. 93-0301 and 94-0041 (Consol.), Order, October 11, 1994 ("*1994 Verizon Payphone Order*"); *Independent Coin Payphone Association and Total Communications Services, Inc.*, Docket No. 88-0412, Order, June 7, 1995 ("*1995 Illinois Bell Payphone Order*").

test for cost-based rates under Section 276. (Ameritech Illinois, Exhibit 4.0, p.6, R. C.Vol. 14, Tab 11, p.6.) Similarly, on May 19, 1997, Verizon filed cost documents with the ICC and self-certified that, with three amendments, its existing tariffed rates for network services to payphone providers satisfied the FCC's new services test. (Verizon Exhibit 20.0, Attached Ex. EWM-1 & EWM-2, R. C.Vol. 24, Tab 28.) Both Illinois Bell and Verizon began receiving federal dial-around compensation as of April 15, 1997 pursuant to their respective self-certifications. (Ameritech Illinois, Exhibit 4.0, p. 6, (Proprietary) R. C.Vol. 14, Tab 11, p.6; GTE Ex. 2.0, Appendix A, Line 11036 Per Call Compensation, (Proprietary) R. C.Vol. 24, Tab 16.)

Pursuant to the FCC's direction that the state commissions should ensure that rates to payphone providers meet the Section 276 requirements, the Illinois Public Telecommunications Association ("Payphone Association"), on behalf of its members, filed a petition with the ICC in May, 1997 requesting it to investigate whether Illinois LECs were charging independent payphone providers network service rates in excess of the cost-based rates required by the FCC's new services test. As described by the ICC in its order granting the investigation, "(t)he investigation would require the Commission to determine the cost-based price under the New Services Test for each network service provided to payphone providers and the amount of refunds, if any, owed to payphone providers who purchased network services from the

LEC at rates which were not cost-based.[7] *Payphone Association Petition Order,* (Illinois Bell Supplemental Appendix, Illinois Appellate Court Brief, Tab D), App., 194a - 195a.

The Payphone Association requested the ICC to investigate the LECs' tariffs and to order refunds to its members of any amounts charged in excess of the cost-based rates required by the FCC. The ICC granted the Payphone Association Petition and initiated the investigation for compliance with the FCC orders. *Illinois Commerce Commission, On its Own Motion, Investigation into Certain Payphone Issues as Directed in Docket 97-0225,* Docket No. 98-0195, Interim Order (November 12, 2003) (*"ICC Payphone Order"*); R. C.Vol. 8, pp. 1932 - 33, App., 19a - 22a.

After the ICC marked its hearings heard and taken, but before any decision was rendered, the FCC amended its earlier orders, clarifying the new services test requirements and holding that the federal cost-based requirements only applied to the Bell operating companies, such as Illinois Bell, as defined in Section 153(4) of the 1996 Act. 47 U.S.C. §153(4). However, the FCC found that state commissions may require non-Bell LECs to comply with the new services test under state authority. As such, the Verizon local exchange operations in Illinois, which formerly belonged to GTE, would no longer be subject to the new services test

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[7] *See Illinois Public Telecommunications Association, an Illinois Not For Profit Corporation, Petition to Determine Whether Illinois Local Exchange Carriers Are in Compliance with the Illinois Public Utilities Act and Section 276 of the Communications Act of 1934,* Docket No. 97-0225, Order, December 17, 1997 (*"Payphone Association Petition Order"*).

under Section 276(b)(1)(C). *FCC Wisconsin Order*, 17 F.C.C.R. 2051, ¶ 31.

The ICC ordered a new round of hearings for the parties to address the matters decided in the *FCC Wisconsin Order*. After these hearings and briefings, the ICC held that Verizon's rates for network services provided to competing payphone providers must comply with the FCC's new services test on state grounds. The ICC proceeded to find that, contrary to their filings of May 15 and May 19, 1997, neither Illinois Bell nor Verizon's tariffed rates were cost-based in compliance with the FCC's new services test. Both Illinois Bell and Verizon were directed to file new tariffs that complied with the new services test requirements. *ICC Payphone Order*, App., 110a, 112a - 113a; R. C.Vol. 8, p. 1976 - 77.

However, the ICC denied the Payphone Association's request for refunds for the excess charges from April 15, 1997 to the date of the order, holding that to order refunds would violate the prohibition against retroactive ratemaking. Relying on two ICC proceedings conducted before the 1996 Act, in which the ICC set rates to payphone providers based on business rates, the ICC held that both the United States Supreme Court and the Illinois Supreme Court have ruled that rates that have been reviewed and approved by the appropriate regulatory agency cannot later be subject to refund, citing *Arizona Grocery Co. v. Atchison T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), *Independent Voters of Illinois v. Commerce Comm'n*, 117 Ill.2d 90 (1987), and *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill.2d 205 (1954). *ICC Payphone Order*, App., 102a - 105a; R. C.Vol. 8, p. 1973. In denying refunds based on the pre-1996 ICC orders, the ICC wholly ignored the FCC's

First Payphone Order that expressly preempted all previous ICC orders approving non-cost-based rates after April 15, 1997. The ICC further ignored the Illinois Bell and Verizon filings of May 15 and May 19, 2006 purporting to comply with the FCC orders, not the previous ICC orders, and the self-certifications by Illinois Bell and Verizon that each was in compliance with the FCC's new services test and had commenced collecting hundreds of millions of dollars in dial around compensation effective April 15, 1997 pursuant to the false certifications. Ameritech Illinois, Exhibit 4.0, p. 6 (Proprietary), R. C. Vol. 14, Tab 11, p. 6; GTE Ex. 2.0, Appendix A, Line 11036, Per Call Compensation (Proprietary): R. C. Vol. 24, Tab 16.

In its Petition for Rehearing, the Payphone Association noted that after agreeing to review the LEC tariffs for compliance with the Section 276 requirements, and having found the LECs in violation of the FCC's orders, the ICC failed to enforce either of the FCC's mandates that cost-based rates must be effective no later than April 15, 1997 and that, to ensure this compliance, incumbent LECs would not be eligible to receive dial-around compensation until their rates were in actual compliance with the new services test. R. C. Vol. 8, pp. 2010 - 2022. When the ICC denied the Petition for Rehearing, the Payphone Association appealed these issues to the Illinois Appellate Court.

Based on the ICC finding that neither Illinois Bell nor Verizon's rates complied with the FCC's new services test, the Payphone Association moved the Illinois Appellate Court for a stay of the appeal and a primary jurisdiction referral to the FCC on the issue of whether the LECs were required to refund the excess charges since April 15, 1997 or, alternatively, to

disgorge themselves of the dial around compensation collected prior to their eligibility. The Appellate Court denied both the stay and the referral to the FCC. The Payphone Association proceeded to file a Petition for Declaratory Ruling with the FCC seeking a ruling on these points.[8]

Meanwhile, on appeal, the Appellate Court found that, under the tariffed rate doctrine, carrier-made rates may be subject to reparations (refunds) if later found to be unreasonable. However, rates established or approved by a regulatory body are required to be charged as long as the order remains in effect. The Appellate Court found the *1994 Verizon Payphone Order* and the *1995 Illinois Bell Payphone Order* approving tariffed rates based on business rates remained in effect until the ICC's November 12, 2003 order in the instant proceeding. Therefore, according to the Appellate Court, the non-cost-based charges to payphone providers were not subject to reparation. Order, App., 7a - 11a. Like the ICC, the Appellate Court failed to address the FCC's preemption of the previous ICC orders and the LECs' certifications that the May 15 and May 19, 1997 filings rates were in purported compliance with the FCC orders.

The Appellate Court further found that the payphone providers did not have standing to seek enforcement of the FCC requirement that Illinois Bell and Verizon must have cost-based rates to be eligible to receive for dial around compensation. According to

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[8] *The Illinois Public Telecommunications Association's Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders,* CC Docket 96-128, filed July 30, 2004 (*"Illinois Association FCC Petition"*).

the Appellate Court, since the payphone providers did not pay the compensation, they did not suffer any injury that would be redressed by the return of the compensation to the long distance carriers. Order at 14a - 15a. Again, the Appellate Court did not address the Payphone Association's argument that the FCC's dial around compensation prerequisite was for the express purpose of ensuring compliance with the new services test requirement, and others. Both points were again raised in a Petition for Rehearing, which was denied.

In its Petition for Leave to Appeal to the Illinois Supreme Court, the Payphone Association again raised these two issues. See Illinois Public Telecommunications Association, Petition for Leave to Appeal to the Illinois Supreme Court, Points Relied On For Reversal, p. 2, App., 196a.

While the Petition to the Illinois Supreme Court was pending, the FCC undertook active review of the issue of refunds of charges found to be in excess of the FCC's new services test after April 15, 1997, pursuant to a primary jurisdiction referral by the Supreme Judicial Court of Massachusetts on a case brought by the New England Public Communications Council.[9] While the Payphone Association was engaged in meetings at the FCC on the issues raised in the Illinois Association FCC Petition and the Massachusetts referral, the Illinois Supreme Court denied the petition for leave to appeal.

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[9] *See FCC Public Notice, New England Public Communications Council, Inc. Filing of Letter from Supreme Judicial Court of Massachusetts Regarding Implementation of the Pay Telephone Compensation Provisions of the Telecommunications Act of 1996,* DA 06-780, Released April 3, 2006.

The Payphone Association moved for reconsideration of the order of denial, a stay of proceedings on the petition for leave to appeal, and a referral of the matter to the FCC as was done by the Supreme Judicial Court of Massachusetts. While this motion was pending, the United States Court of Appeals, Ninth Circuit, issued the first federal appellate court decision on the issue of refunds for violation the cost-based rate requirements of Section 276. The Ninth Circuit found that the filed rate doctrine did not prohibit refunds of charges of rates found in a LEC's state tariffs for services provided to payphone providers that were in excess of the cost-based requirements of the FCC's new services test. According to the U. S. Court of Appeals, "the filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff. " *Davel Communications, Inc.*, 460 F.3d at 1085 (9th Cir. 2006). It reversed the District Court's dismissal of the complaint and referred the matter to the FCC under the doctrine of primary jurisdiction. *Id.*, at 1090, 1093.

The Payphone Association moved to file the Ninth Circuit decision as supplemental authority for its motion to reconsider, noting that the Ninth Circuit's determination of federal law stands in direct conflict with the decision of the Illinois Appellate Court. Although the Illinois Supreme Court granted leave to file this supplemental authority, nevertheless, it denied the Payphone Association's motion for reconsideration. App., 184a - 187a.

C. Other Proceedings

In addition to the Massachusetts and Ninth Circuit proceedings, numerous states have wrestled with the issue of whether refunds for state-tariffed rates in excess of the cost-based requirement of the FCC's new services test are available. At least five state commissions have ordered refunds of excessive charges: Michigan, Tennessee, Kentucky, South Carolina, and Indiana. (For the list of cases, see App., 197a - 198a.) Two other state commissions have approved settlements that require refunds of excessive charges dating back to April 15, 1997: Louisiana and Pennsylvania. (For the list of cases, see App., 198a.)

In addition to these seven states, there are the eleven states governed by the Ninth Circuit proceedings, for a total of eighteen states where refunds are available.

Besides Illinois, refunds have been denied in at least four other states: New York, Mississippi, Florida, and Massachusetts. (For the list of cases, see App., 198a - 199a.)

As noted, the Supreme Judicial Court of Massachusetts has stayed the review of its administrative order and referred the issue to the FCC. Together with the Ninth Circuit referral, and the Illinois Association FCC Petition, there are also three other petitions for declaratory ruling on the issue of refunds pending before the FCC: Independent Payphone Association of New York, Inc., Southern Public Communication Association, and Florida Public Telecommunications Association, Inc. (For the list of petitions, see App., 200a.) In addition to these petitions, the Oregon Public Utility Commission has

made a letter request to the FCC for guidance on the refund issue.

On September 28, 2006, the Michigan Court of Appeals affirmed the decision of the Michigan Public Service Commission awarding refunds for excessive charges to payphone providers by Michigan Bell Telephone Company and Verizon North, Inc. f/k/a GTE North, Inc. in violation of the FCC's cost-based rate requirements. Unlike the Illinois Appellate Court which avoided such fact, the Michigan Appellate Court recognized that any tariff approved prior to April 15, 1997 was preempted by the FCC's orders. The FCC required the LECs to adjust their rates to payphone providers to comply with the new services test, and the LECs were bound to comply. The Michigan Appellate Court proceeded to hold that the LECs were not entitled to rely on such tariffs and that the state commission was not precluded from ordering refunds for charges in excess of the federal requirements. *SBC Michigan v. Michigan Public Service Commission*, No. 254980, (Mich. App. Ct. September 28, 2006) (unpublished), App., 157a - 183a.

REASONS FOR GRANTING THE PETITION

I. This Court Needs To Bring Uniformity to the National Payphone Scheme Enacted by Congress and Should Settle the Conflict Between the States and the Federal Circuit on Whether Refunds of Excess Charges Are Available Where Local Telephone Carriers Violate the Cost-Based Rate Requirement of Section 276 of the Communications Act of 1934.

Section 276(a) of the Communications Act of 1934 prohibits any Bell operating company that

provides payphone service (1) from subsidizing its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations and (2) from preferring or discriminating in favor of its payphone services. 47 U.S.C. §276(a). To implement these requirements, the FCC prescribed nonstructural safeguards based on those adopted in the Computer Inquiry-III (CC Docket 90-623) proceeding, as directed by Section 276 (b)(1)(C). 47 U.S.C. §276(b)(1)(C); *First Payphone Order, supra.* Through these safeguards the FCC required LECs to tariff local network services to independent payphone providers at cost-based rates that complied with the FCC's new services test, effective no later than April 15, 1997. *Payphone Reconsideration Order,* ¶163. And to ensure enforcement of the cost-based rate requirement, the FCC made actual compliance a precondition for an incumbent LEC's eligibility for the receipt of dial around compensation under Section 276(b)(1)(A). 47 U.S.C. §276(b)(1)(A); *Id.,* ¶131. The various state commissions were charged with applying these requirements and ensuring compliance. *Id.,* ¶163.

Section 276 was part of a sweeping restructuring of the telecommunications industry brought about by the passage of the 1996 Act. The 1996 Act extended federal jurisdiction into certain areas of intrastate telecommunications, removing it from the states' exclusive control and establishing a federal regime wherein the state commission participation is guided by federal agency regulations and orders. *See AT&T Corporation v. Iowa Utilities Board,* 525 U.S. 366, 378 fn. 6, 381 fn. 8 (1999).

Section 276 was among the areas where federal jurisdiction was extended to intrastate services. One of

the federal requirements imposed on the LECs was that the rates for services provided to payphone providers be cost-based, in compliance with the FCC's new services test established in its Computer III proceeding. The United States Circuit Court of Appeals for the District of Columbia succinctly describes the history of the FCC's implementation of Section 276's requirement for cost-based rates in *New England Public Communications Council, Inc.*, 334 F.3d at 71-72 (D.C. Cir. 2003).

From November, 1996 to April, 1997, the FCC issued four orders holding that intrastate rates to payphone providers must be cost-based no later than April 15, 1997. In the *First Payphone Order,* the FCC concluded that, under the 1996 Act's Sections 276(a) and 276(b)(1)(C), the FCC's Computer III tariff procedures and pricing were required for the LECs' provision of basic network services to competing payphone providers, such as the Payphone Association's members.

> ...Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we conclude that the new services test is necessary to ensure central office coin services are priced reasonably. ...
>
> . . . Accordingly, we conclude that Computer III tariff procedures and pricing are more appropriate for basic payphone services provided by LECs to other payphone providers. *Pursuant to Section 276 (c), any inconsistent state requirements with regard to this matter are preempted.*

First Payphone Order, 11 F.C.C.R. at 30614-15, ¶¶146, 147 (italics added).

The FCC determined that the LECs' rates to payphone providers must comply with the FCC's new services test to be reasonable under the 1996 Act. Any state requirements setting these rates at other than cost-based rates were expressly preempted. The FCC looked to state regulatory commissions to ensure compliance.

In implementing Section 276(b)(1)(A), the FCC held that independent payphone providers were entitled to receive dial-around compensation from long distance carriers for such carriers' completed access code and toll free calls that originate on the payphone provider's payphones. *First Payphone Order*, 11 F.C.C.R. at 20568-69, ¶¶52-54. The FCC provided that the LECs, including Illinois Bell and Verizon, would also be eligible to receive dial-around compensation for similar calls that originate on the LEC's payphones one year from the effective date of the FCC's rules. *First Payphone Order*, 11 F.C.C.R. at 20567, ¶50.

On reconsideration, the FCC amended the date by which the LECs could receive dial-around compensation, granting their request to receive compensation once the LEC had fully complied with the FCC's payphone regulatory scheme, including the implementation of cost-based rates. The FCC held that a LEC must be able to certify it has met all of the FCC payphone requirements to be eligible for the compensation.

> The RBOCs, BellSouth, and Ameritech request that the Commission clarify that the LECs be allowed to eliminate subsidies and reclassify

> their assets, and, as a result, be eligible to receive payphone compensation, by April 15, 1997, as opposed to on that date. We clarify that the LECs may complete all of the steps necessary to receive compensation by April 15, 1997.
>
> . . . We must be cautious, however, to ensure that LECs comply with the requirements we set forth in the Report and Order. Accordingly, we conclude that LECs will be eligible for compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276. LECs may file and obtain approval of these requirements earlier than the dates included in the Report and Order, as revised herein, but no later than those required dates. To receive compensation a LEC must be able to certify the following: . . . 5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones);

Payphone Reconsideration Order, 11 F.C.C.R. at 21293, ¶¶ 130-131.

The FCC also explained the procedure for the states to follow.

> *States must apply these requirements and the Computer III guidelines for tariffing such intrastate services.* States unable to review these tariffs may require the LECs operating in their state to file these tariffs with the Commission [FCC]. . . . We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276. As required in the Report and Order, and affirmed herein, all required tariffs, both

> intrastate and interstate, must be filed no later than January 15, 1997 and *must be effective no later than April 15, 1997.*

Payphone Reconsideration Order, 11 F.C.C.R. at 21308, ¶163 (italics added).

As the April 15, 1997 deadline approached, the FCC restated the above requirements. It held that a LEC would not be eligible for dial around compensation in any state where the LEC failed to have cost-based rates in effect.

> We *emphasize* that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived herein, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. . . . As discussed above, LECs that have not complied with these requirements will not be entitled to receive compensation.
>
> . . . The plain language of the Order on Reconsideration provides that state tariffs for payphone services must be cost-based, consistent with the requirements of Section 276, nondiscriminatory, and consistent with Computer III guidelines. . . .
>
> . . . The intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state.

Bureau Waiver Order, 12 F.C.C.R. at 21011-12, ¶¶30 - 31, 33 (italics added).

Illinois Bell and other LECs requested additional time to meet the April 15, 1997 deadline for establishing cost-based rates. Through the Common Carrier Bureau, the FCC granted the LECs an extension to May 19, 1997 on the condition that the payphone providers receive a refund or credit back to April 15, 1997 for any rates paid in excess of the required cost-based rates. The FCC again emphasized that the provisioning of cost-based rates remained a prerequisite for a LEC to be eligible to receive compensation.

> In the recent Bureau Waiver Order, we *emphasized* that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines; . . .

Bureau Clarification Order, 12 F.C.C.R. at 21374, ¶ 10 (italics added).

In addressing the procedure to challenge a LEC's self-certification that it has complied with the Commission's Section 276 requirements, the Commission admonished that carriers could not engage in self-help. Once a LEC certified compliance, the LEC could begin receiving dial around compensation. But the Commission again made it clear that the certification did not substitute for the actual compliance necessary to be eligible for compensation.

However, actual compliance is a determination that must be made by a commission.

> We *emphasize* that a LEC's certification letter does not substitute for the LEC's obligation to comply with the requirements as set forth in the Payphone Orders. The Commission consistently has stated that LECs must satisfy the requirements set forth in the Payphone Orders, subject to waivers subsequently granted, to be eligible to receive compensation. Determination of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction.

Bell Atlantic-Delaware v. Frontier Communications Services, 1999 WL 754402 (F.C.C.), DA 99-1971, ¶28 (Com. Car. Bur. released September 24, 1999) (italics added).

Despite these extensive efforts by the FCC to implement a national payphone regime as directed by Section 276, the various state commissions have taken irreconcilable positions on the enforcement of these requirements. Although the FCC was, in its own words, emphatic that cost-based rates be in effect no later than April 15, 1997, some state commissions, like Illinois, after having determined that a LEC is in violation of the federal requirement, have enforced it only prospectively, years after the April 15, 1997 date, after lengthy, and sometimes multiple hearings. Meanwhile, other states have applied the FCC's explicit requirements by ordering refunds of any excessive rates back to the FCC's April 15, 1997 deadline. A LEC's failure to meet the federal cost-based requirement has resulted in refunds in Michigan, Tennessee, Kentucky, South Carolina, Indiana,

Louisiana, and Pennsylvania, where independent payphone providers have been made whole in compliance with the FCC's orders. But similar past violations in Illinois, New York, Mississippi, Massachusetts, and Florida have gone without enforcement of the FCC's deadline.

Additionally, despite the FCC's requirement that actual compliance with the cost-based rate requirements is a condition precedent for a LEC to be eligible for dial around compensation, and that the state commissions are the appropriate entity to enforce this requirement, the ICC did nothing to ensure compliance with the FCC order. The Illinois Appellate Court's holding that payphone providers suffered no cognizable injury based on this violation ignores both the state commission's role in the FCC's scheme and the FCC's holding that the purpose of the requirement is to enforce the payphone provider's right to cost-based rates.[10]

On identical issues of federal law and policy, different jurisdictions are reaching opposite conclusions, resulting not in a unified national payphone regime, but one of sporadic enforcement and implementation. Although at the outset, the FCC expressly preempted all state regulations inconsistent with the FCC's holding that cost-based rates must be in effect no later than April 15, 1997,[11] states such as Illinois have ignored this federal preemption and have upheld state regulatory orders as continuing to authorize non-cost-based rates remaining in effect as late as November 12, 2003. In direct contrast, Michigan

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[10] *Payphone Reconsideration Order*, ¶131.

[11] *First Payphone Order*, ¶147.

has recognized that the FCC orders preempted state tariffs approved prior to the April 15, 1997 deadline and that charging non-cost-based rates violates federal law, subjecting the LEC to refunding the excessive charges. The Michigan Appellate Court rejected the same filed rate doctrine defense relied on by the Illinois Appellate Court.

The Ninth Circuit has issued the initial ruling of a United States Circuit Court on this issue, finding that the filed rate doctrine does not bar the issuance of refunds for rates that fail to comply with the new services test. It found that the doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement. *Davel Communications, Inc.*, 460 F.3d at 1084 - 1086. Although presented with this conflicting interpretation of federal law in the motion to reconsider the order denying the Payphone Association's petition for leave to appeal, the Illinois Supreme Court chose not to accept the appeal or to attempt to reconcile the Illinois position with that of the eleven states governed by the Ninth Circuit case.

Even the effort to achieve national uniformity has been sporadic. Although Massachusetts found that refunds were not available, the Supreme Judicial Court of Massachusetts agreed to stay its appeal and refer the issue to the FCC. In reaching a determination that refunds are available, the Ninth Circuit also referred the issue to the FCC. The Circuit Court recognized that the refund issue is national in scope, affecting payphone providers throughout the country. For the reimbursement requirement to be applied uniformly, the FCC must construe its scope. *Id.*, 460 F.3d at 1090.

Yet, the Illinois courts have repeatedly rebuffed requests to refer this issue to the FCC to reach a uniform determination of federal law. After the ICC determined that the LECs' rates did not comply with the FCC's new services test, the Payphone Association asked both the Illinois Appellate Court and the Illinois Supreme Court to refer the issue of refunds to the FCC for guidance. Both requests were denied, despite the Illinois courts being fully informed of the conflicting decisions from the other states and the Ninth Circuit, and of Illinois' minority position on the issue.

The Payphone Association has done all that is in its power to seek uniform and effective enforcement of the requirements of Section 276 and the FCC's orders. Like the payphone providers in the twenty three other states where this issue has arisen, it seeks a consistent enforcement of the national payphone regime established by Congress and ordered by the FCC. With the various independent and conflicting determinations being made by the states and the Circuit Court, this is an important question of federal law essential to the promotion of the national scheme that needs to be settled by this Court.

II. The Illinois Appellate Court Holding Conflicts With This Court's Decisions on the Filed Rate Doctrine.

Both the ICC and the Illinois Appellate Court held that reparations of the excess charges would violate the filed rate doctrine and the rule against retroactive ratemaking. The filed rate doctrine is based on the mutual requirements that the regulated entity may charge only the rates filed in the tariff, that the rates be nondiscriminatory, and that the rates be reasonable. *Maislin Industries, U.S., Inc. v. Primary Steel,*

Inc., 497 U.S. 116, 128 (1990). The filed tariff rate is the legal rate, but it is not the lawful rate unless it is found to be reasonable. Although payphone providers were bound to pay the legal rate, if they establish that the rate is unreasonable, they are entitled to recover reparations for the excessive charges. *Maislin Industries*, 497 U.S. at 128-129; *Arizona Grocery Co. v. Atchison, T. & S. Ry. Co.*, 284 U.S. 370, 384-385 (1932).

The prohibition against retroactive ratemaking involves a situation where the commission undertakes a hearing to review the regulated entity's rates, determines what is a lawful rate, and then fixes that rate prospectively. In these circumstances, the regulating agency is acting in a quasi-legislative capacity, prescribing the reasonable rate to be charged for the future. The regulated entity is bound to charge the rate ordered by the commission. At a later hearing, *as to the situation existing when its previous order was entered*, the commission may not retroactively declare its own finding erroneous and subject the carrier to reparations, measured by what the commission should have decided in the earlier hearing to be a reasonable rate. *Arizona Grocery*, 284 U.S. at 390.

However, as to the great mass of rates that are carrier-made rates, such as in the instant case, the carrier has the burden of conforming its charges to a lawful rate. The commission acts in a quasi-judicial capacity, its actions affecting only the past as far as any remedy is concerned, and deciding for the present that the rate was then unreasonable. If the commission adjudicates that the rate charged was unreasonable, then reparations are to be awarded. Adjudicating that a carrier-made tariff rate is unreasonable, and therefore unlawful, and awarding reparations for the excess

charges does not violate the prohibition against retroactive ratemaking. A commission may often act in both capacities in a single proceeding. *Arizona Grocery,* 284 U.S. at 384-385, 388, 390.

Illinois law on the filed rate doctrine rests upon the same basis. See 220 ILCS 5/9-252. The seminal case is *Mandel Bros, Inc. v. Chicago Tunnel Terminal Co.,* 2 Ill.2d 205 (1954). The Illinois Supreme Court conducted the same analysis, relying upon by the U.S. Supreme Court decision in *Arizona Grocery, supra. See also Citizens Utilities Co. v. ICC,* 124 Ill.2d 195 (1988).

The tariffed rates of Illinois Bell and Verizon were the legal rates, but they were not the lawful rates unless they were reasonable. *Mandel Bros.; Arizona Grocery.* The FCC found that to be reasonable the rates had to be cost-based in compliance with the new services test. *First Payphone Order,* ¶146. The ICC found that they were not. Nevertheless, the Illinois Appellate Court held that since the ICC had previously approved the rates of both LECs, as long as the ICC orders remained in effect Illinois Bell and Verizon were entitled to rely on them under *Arizona Grocery* and *Mandel Bros.* Yet the Illinois Appellate Court misconstrued the rule against retroactive ratemaking in the context of this case.

Retroactive ratemaking prohibits the ICC from making a different determination as to the reasonableness of the rates as to the situation existing at the time the previous order was entered. *Arizona Grocery,* 284 U.S. at 390. In neither the *1994 Verizon Payphone Order* nor the *1995 Illinois Bell Payphone Order* was there a requirement or a determination of whether the LEC's rates were cost-based. Furthermore, the LECs may only rely on the previous ICC orders as long

as they remained in effect. *Arizona Grocery,* 284 U.S. at 390; *Mandel Bros.*, 2 Ill.2d at 211-12. But the ICC orders had approved non-cost-based rates pursuant to the Illinois Public Utilities Act. The FCC had expressly preempted all state rate requirements inconsistent with the federal requirement for cost-based rates that complied with the new services test effective no later than April 15, 1997. *First Payphone Order,* ¶147; *Payphone Reconsideration Order,* ¶163. Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, the Illinois law must yield to the federal requirements. The ICC Payphone Orders approving tariff rates on a non-cost-basis were no longer in effect on or after April 15, 1997 and the LECs had no reasonable expectation to rely on the ICC's previous orders. *In accord SBC Michigan v. Michigan Public Service Commission,* App. 180a - 181a.

In fact, neither Illinois Bell nor Verizon relied on the previous ICC orders. Both filed with the ICC in purported compliance with the FCC orders, not with the ICC orders, on May 15 and May 19, 1997, respectively. The ICC did not conduct any hearing nor issue any finding that these filings met the FCC's new services test. In these circumstances, the LECs' rates were like "the great mass of rates (that are) carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation" if found to be unreasonable. *Arizona Grocery,* 284 U.S. at 390; *In accord Maislan Industries,* 497 U.S. at 128 - 129.

The FCC found that to be reasonable, the LEC rates for network services provided to payphone providers had to be cost-based in compliance with the new services test. *First Payphone Order,* ¶146. Illinois

Bell and Verizon each made their own determination as to what rates it would charge in response to these federal requirements. Neither was bound by previous orders of the ICC nor had they any reasonable expectation to rely upon their findings. After a hearing, the ICC determined that neither Illinois Bell nor Verizon's rates were cost-based in compliance with the FCC's new services tests. *ICC Payphone Order,* App., 110a. Therefore they were unlawful and subject to reparations. *Arizona Grocery; Maislan Industries.* The Illinois Appellate Court's holding that the filed rate doctrine bars refund of the excessive charges is in conflict with the decisions of this Court and stands as an impediment to the national payphone regime required under Section 276 of the 1996 Act and the orders of the FCC.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the Court should request the Solicitor General for its view in the matter, or, in the alternative, the petition for a writ of certiorari should be granted and the cause remanded with directions to refer the matter to the Federal Communications Commission under the doctrine of primary jurisdiction.

Respectfully submitted,

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OCTOBER 2006

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FIFTH DIVISION
November 23, 2005

No. 1-04-0225

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

[ENTERED: November 23, 2005]

THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION,	)	Petition for Review of the Orders of the Illinois Commerce Commission.
Petitioner-Appellant	)	
v.	)	
	)	No. 98-0195
ILLINOIS COMMERCE COMMISSION, ILLINOIS BELL TELEPHONE COMPANY d/b/a SBC ILLINOIS, VERIZON NORTH, INC. and VERIZON SOUTH, INC.,	)	
Respondents-Appellees.	)	

ORDER

This appeal involves the tariff rates SBC Illinois and Verizon North, Inc. and Verizon South, Inc. (Verizon) charge when they provide telecommunications services to unaffiliated, independent providers of payphone services. The Illinois Public Telecommunications Association (the IPTA), a trade association representing the interests of independent payphone providers, filed a petition with the Illinois Commerce Commission (ICC) contending that SBC Illinois and Verizon charged excessively high tariff rates and that they should refund the excess charges. The IPTA further contended that Verizon gave itself an unfair competitive advantage by failing to charge itself certain costs that it charged to competing payphone providers. The ICC ruled that: (1) SBC Illinois and Verizon were not required to refund any excess charges; and (2) Verizon did not give itself an unfair competitive advantage by certain costs it charged to competing payphone providers. The IPTA appeals. We affirm.

Independent payphone providers (IPPs) subscribe to telecommunications services from SBC Illinois and Verizon that are functionally equivalent to the services used by other retail business customers, except for some unique screening and blocking functions required to control fraudulent use of payphones. Therefore, prior to the ICC's order in this proceeding, telecommunications services were offered to IPPs at rates based on retail business rates. The ICC approved Verizon's IPP rates 1994. See GTE North Incorporated: Proposed Filing to Restructure and

Consolidate the Local Exchange, Toll and Access Tariffs with the Tariffs of the Former Contel of Illinois, Inc., docket nos. 93-0301 & 94-0041 (cons.) (October 11, 1994) (the 1994 Payphone Order.) The ICC authorized modifications in Verizon's rates in January 1997.

The ICC has twice approved SBC Illinois' IPP rates at levels equivalent to its retail business rates. First, in commission docket nos. 84-0464 & 84-0442 (cons.), SBC Illinois proposed, and the ICC approved, IPP rates based on the rates for retail business services. See Illinois Bell Telephone Company Proposed Rates, Rules and Regulations for Customer Provided Pay Telephone Services, Ill. C.C. docket nos. 84-0464 & 84-0442 (cons.) (April 24, 1985) (the 1985 Payphone Order.) In commission docket no. 88-0412, SBC Illinois, the IPTA, and the ICC agreed that IPP rates would remain equivalent to retail business rates, with the exception of a discounted usage rate schedule, through June 30, 2005. See Independent Coin Payphone Association and Total Communication Services, Inc., Ill. C.C. docket no. 88-0412 (June 7, 1995) (the Payphone Order.)

Eight Months after the ICC entered the 1995 Payphone Order, Congress enacted section 27 of the Telecommunications Act of 1934. 47 U.S.C. §276 (1996). Section 276 establishes certain national standards governing the payphone industry. The Federal Communications Commission (FCC) promulgated rules to implement section 276, and required "incumbent local exchange carriers", such as SBC Illinois and Verizon, to comply with the so-called "new services test" for setting IPP rates. The FCC's new

services test is a cost-based test that sets the direct cost of providing a new service as a price floor and then adds a reasonable amount of overhead to derive the overall price of the service.

The FCC ordered incumbent local exchange carriers to file IPP service tariffs with their state commissions, but only if those services were not already tariffed. The FCC required incumbent local exchange carriers that already had effective tariffs on file to provide their state commissions with documentation demonstrating compliance with the FCC's pricing policy. On May 15, 1997, SBC Illinois filed with the ICC the additional cost documentation required by the FCC and self-certified that its existing tariffed rates for IPP services satisfied the FCC's new services test for cost-based rates under section 276.

Similarly, in May 1997, Verizon self-certified, with three amendments, that its existing tariffed rates for IPP services satisfied the FCC's new services test for cost-based rates under section 276.

On May 8, 1997, the IPTA filed a petition requesting that the ICC investigate Illinois' incumbent local exchange carriers' compliance with section 276. In an order dated December 17, 1997, the ICC directed that it would investigate SBC Illinois' and Verizon's rates for compliance with the FCC's new services test. The ICC also required SBC Illinois and Verizon to show that they were satisfying the so-called "imputation" test set forth in the Public Utilities Act. 220 ILCS 5/13-505.1 (West 2002). Under the imputation test, incumbent local exchange carriers,

such as SBC Illinois and Verizon, are required to charge themselves certain costs (at the premium tariffed rate) that they charge to competing payphone providers. The imputation test is designed to enhance competition; in the absence of such a test, the incumbent local exchange carriers would have every incentive to charge payphone competitors excessive rates and drive them out of business.

Hearings were held, testimony was taken, and evidence was presented into the record. At the conclusion of the hearings, and while the parties were briefing the issues, the FCC amended its earlier orders and held that the new services test requirement under section 276 applied only to Bell Operating Companies. As such, Verizon was not subject to the new services test under section 276. However, the FCC found that state commissions may require non-Bell incumbent local exchange carriers, such as Verizon, to comply with the new services test under state authority.

The ICC ordered a new round of hearings to address these matters. After these hearings and briefings, the ICC found that Verizon's rates for IPP services must comply with the FCC's new services test on state grounds. The ICC further found that neither SBC Illinois nor Verizon met the FCC's new services test. The ICC ordered reductions in both SBC Illinois' and Verizon's rates and it directed SBC Illinois and Verizon to file new tariff rates that complied with the new services test.

However, the ICC denied the IPTA's request for refunds, ruling that the refund claim was barred by the prohibition against retroactive ratemaking.

The ICC then addressed whether SBC Illinois and Verizon met the imputation test. The parties agreed that SBC Illinois met the imputation test. Relevant to this appeal, the ICC also found that Verizon met the imputation test for the following services: primary interexchange carrier, answer supervision, call screening and blocking.

The IPTA appeals, contending that the ICC erred by: (1) denying its request for refunds of the difference between SBC Illinois' and Verizon's new rates and the rates the ICC had previously authorized; and (2) finding that Verizon met the imputation test for primary interexchange carrier, answer supervision, call screening and blocking.

I. Standard of review

The ICC is the administrative agency responsible for setting rates that public utilities may charge their customers. United Cities Gas Co. v. Illinois Commerce Commission, 163 Ill. 2d 1, 11 (1994). It is governed by the Public Utilities Act, in which the legislature has enunciated the ICC's powers and duties. United Cities, 163 Ill. 2d at 11. The ICC is the fact-finding body in the ratemaking process. On appeal from an order of the ICC, its findings of fact are considered prima facie true; its orders are considered prima facie reasonable; and the burden of proof on all issues raised in an appeal is on the appellant. United Cities, 163 Ill. 2d at 11.

An order of the ICC will be reversed only if it is outside the jurisdiction of the ICC or is note supported by substantial evidence, or if the proceedings or manner in which the order was arrived at violated the State or Federal constitution or relevant laws, to the prejudice of the appellant. United Cities, 163 Ill. 2d at 12. Apart from examining whether the ICC acted outside the scope of its constitutional or statutory authority, the reviewing court is limited to determining whether the ICC's factual findings are against the manifest weight of the evidence. United Cities, 163 Ill. 2d art 12. However, the ICC's interpretation of a question of law is not binding on the court of review. United Cities, 163 Ill. 2d at 12.

II. The ICC's denial of the IPTA's request for refunds

As discussed above, Congress enacted section 276 of the Telecommunications Act of 1934, establishing national standards governing the payphone industry. The FCC promulgated rules to implement section 276, establishing a "new services test" which in effect required incumbent local exchange carriers to provide services to competing payphone providers at cost-based rates by April 15, 1997. Both SBC Illinois and Verizon self-certified that they were in compliance with the new services test; however, on November 12, 2003, the ICC found that neither SBC Illinois nor Verizon were in compliance with the new services test and the ICC ordered reductions in their rates. The ICC denied the IPTA's request for refunds of the excess charges since April 15, 1997, holding that

such refunds would violate the prohibition against retroactive ratemaking.

The IPTA contends that the ICC erred by denying its request for refunds of the excess charges since April 15, 1997. Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Railway Co., 284 U.S. 370, 76 L. Ed. 348, 52 S. Ct. 183 (1932) and Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co., 2 Ill. 2d 205 (1954) are controlling. In Arizona Grocery Co., the United States Supreme Court held that when the Interstate Commerce Commission declares a specific rate to be the reasonable and lawful rate for the future, it "speaks as the [l]egislature, and its pronouncement has the force of a statute." Arizona Grocery Co., 284 U.S. at 386. The Supreme Court further held that "[w]here the [Interstate Commerce Commission] has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier." The carrier is entitled to rely on that rate for as long as it is in effect and is not required to make reparations if the commission later determines that the declared rate was unreasonable. Arizona Grocery Co., 284 U.S. at 390.

In Mandel Brothers, the Illinois Supreme Court adopted the reasoning of Arizona Grocery Co. Mandel Brothers involved a request by a shipper to recover reparations for allegedly excessive rates charged by a carrier. New, increased rates had taken effect upon the ICC's approval of them, but the increase later was set aside on judicial review. Mandel Brothers, 2 Ill. 2d at 206. The shipper then filed a complaint with the ICC for reparations, seeking reimbursement for its

payments of the invalid rates. Mandel Brothers, 2 Ill. 2d at 20. In its analysis of the issue, the supreme court distinguished between carrier-made rates (i.e., rates which had become effective without prior regulatory examination and approval) and rates established or approved by a regulatory body. Mandel Brothers, 2 Ill. 2d at 209. The supreme court held that: as to carrier-made rates, reparations (refunds) may be awarded if those rates are later found to have been unreasonable. Mandel Brothers, 2 Ill. 2d at 209. As to rates established or approved by a regulatory body, the supreme court held that a subsequent reduction in those rates affords no right of action for a refund of the difference between the new rates. Mandel Brothers, 2 Ill. 2d at 209. The supreme court noted that, in the case before it, the "action of the [ICC] in approving the new schedule of rates was legislative in character and prospective in its operation" (Mandel Brothers, 2 Ill 2d at 210) and therefore that the rate approved by the ICC was the rate which the utility was required to charge as long as the order of the ICC remained in effect. Mandel Brothers, 2 Ill. 2d at 211-12. The supreme court held that it therefore cannot be said that "the utility charged an excessive rate which gave rise to a claim for reparations." Mandel Brothers, 2 Ill. 2d at 212.

Similar to Mandel Brothers, The ICC in the present case approved the rates charged by SBC Illinois and Verizon. See our discussion above concerning the ICC's approval of SBC Illinois' rates in the 1985 and 1995 Payphone Orders, and the ICC's approval of Verizon's rate in the 1994 Payphone Order. Since the rates in question were the subject of regulatory approval, SBC Illinois and Verizon were entitled to rely

on those rates for as long as they were in effect, i.e. until November 12, 2003, when the ICC required SBC Illinois and Verizon to reduce their rates in accordance with FCC rules implementing section 276 of the Telecommunications Act of 1934. Since the rates in question were approved by the ICC, the subsequent reduction in those rates in November 2003 affords no right of action for a refund of the difference between the old and new rates.

The IPTA contends, though, that a different outcome is required because section 276 of the Telecommunications Act of 1934 preempted the rates approved by the ICC in the 1985, 1994, and 1995 Payphone Orders and because the FCC required new rates in compliance with section 276 to be filed by April 15, 1997. The IPTA contends that since section 276 preempted the rates approved in the payphone orders, SBC Illinois and Verizon were not entitled to rely on those rates. The IPTA further contends that since the rates charged by SBC Illinois and Verizon after April 15, 1997, were ultimately found not to have been in compliance with section 276, a refund action may be brought.

The IPTA's argument is unavailing. Section 276(c) merely states: "To the extent that any State requirements are inconsistent with the [FCC's] regulations, the [FCC's] regulations on such matters shall preempt such State requirements." 47 U.S.C. §276(c) (1996). Thus, under section 276, preemption turned on whether the rates at issue here were in compliance with FCC's regulations. However, Section 276 did not state whether or not the rates approved by

the ICC were in compliance with the FCC's regulations, nor did section 276 provide that the FCC would make the determination as to whether the rates approved by the ICC were in compliance; rather, as conceded by the IPTA, the FCC looked to state regulatory commissions to ensure compliance with the FCC's regulations. In other words, the existing rates remained in effect until the ICC determined whether or not they complied with the FCC's regulations. Therefore, as discussed above, SBC Illinois and Verizon were entitled to rely on the rates approved by the ICC, which remained in effect until November 12, 2003; according, the ICC did not err in denying the IPTA's claim for refunds.

III. The ICC's application of the imputation test

As discussed above, the Public Utilities Act sets forth the so-called "imputation test", whereby incumbent local exchange carriers, such as SBC Illinois and Verizon, are required to charge themselves certain costs a the premium tariffed rate that they charge to competing payphone providers. The IPTA appeals the ICC's finding that Verizon met the imputation requirement for the following services " primary interexchange carrier, answer supervision, call screening and blocking.

A. Primary Interexchange Carrier Charges

A payphone provide my elect to pre-subscribe its phones to an interexchange carrier (IXC), meaning that long-distance calls made from the phones are automatically routed to the subscribed IXC for service.

When a phone is pre-subscribed, the primary interexchange carrier charge is imposed on the payphone provider.

IPTA witness Gary Pace calculated the primary interexchange carrier charges Verizon should have imputed. Verizon witness Steve Olson and Dr. Edward Beauvais testified that Mr. Pace based his calculations under the assumption that all of the payphones in Verizon's operation were not presubscribed. Mr. Olson and Dr. Beauvais testified that, contrary to Mr. Pace's assumption, very few of the payphones are not presubscribed. Mr. Olson and Dr. Beauvais testified that Verizon was only required to impute the primary interexchange carrier costs for its non-presubscribed phones, which it did. The ICC found Mr. Olson's and Dr. Beauvais' testimony persuasive, and found that Verizon correctly imputed the primary interexchange carrier charges. The ICC's factual findings are not against the manifest weight of the evidence; therefore, we affirm the ICC's finding that Verizon correctly imputed the primary interexchange carrier charges.

B. Answer supervision, call screening and blocking

Verizon's interstate payphone rates consist of two line rates and four rates for ancillary services or features. The two line rates are: (1)Customer Owned Coin Telephone (COCOT) service; and (2) Customer Owned Pay Telephone (COPT) service. The four ancillary features are: (1) answer supervision; (2) billed number screening; (3) 900 and international blocking; and (4) selective class of call screening.

COCOT service is the provision of a basic line and dial tone. The service provides no access to ancillary features. To obtain the ancillary features, payphone providers using the COCOT service must connect a certain type of payphone, called a "smart" phone, that has the capability to internally generate the ancillary features.

COPT service is a telephone line that not only provides a dial town but also accesses the intelligence of Verizon's central office to provide the ancillary features. Because the line itself offers this capability, the "smart" payphone is not required, and the payphone connected to the line is commonly referred to as a "dumb" payphone.

Thus, answer supervision, call screening and blocking are ancillary features that payphone providers only need to purchase when they elect to use dumb payphones. Because dumb payphones do not have the capability to provide ancillary features, the providers rely on the intelligence of Verizon's central office to provide those features. Smart payphones are capable of providing the ancillary features independently, and payphone providers can avoid charges for ancillary features by electing to use smart phones.

Mr. Pace testified for the IPTA that the costs associated with answer supervision, call screening and blocking should be imputed for all Verizon payphones without regard to whether the phones are smart or dumb. Dr. Beauvais rebutted Mr. Pace by explaining that ancillary features are only purchased when dumb payphones are utilized, and Dr. Beauvais and Mr.

Olson testified that Verizon correctly imputed the charges for the ancillary feature for the number of its payphones that are dumb phones. The ICC found Dr. Beauvais' and Mr. Olson's testimony persuasive and found that Verizon correctly imputed the charges for the ancillary features. The ICC's factual findings are not against the manifest weight of the evidence. Accordingly, we affirm.

IV. Dial around compensation

The FCC ruled that once SBC Illinois and Verizon complied with the new services test, they could recover "dial-around compensation" from interexchange carriers for such carriers completed access code and toll free calls that originate on the payphone providers' payphones. As discussed, SBC Illinois and Verizon self-certified that they were in compliance with the new services test; subsequently, the SBC Illinois and Verizon received a dial around compensation from interexchanging carriers.

The IPTA contends that SBC Illinois and Verizon should not have received dial around compensation, as they were never in compliance with the FCC's new services test. The IPTA lacks standing to raise this issue. Standing requires some injury to a legally cognizable interest. Glisson v. City of Marion, 188 Ill. 2d 211, 221 (1999).

The IPTA (and its members) did not pay the dial around compensation; those payments were made by interexchanging carriers who are not parties to this appeal. The IPTA therefore suffered no injury that

would be redressed by the return of the dial around compensation to the interexchanging carriers; accordingly, the IPTA lacks standing to raise this issue on appeal.

For the forgoing reasons, we affirm the ICC. As a result of our disposition of this case, we need not address the other arguments on appeal.

Affirmed.

O'BRIEN, j., with GALLAGHER, P.JL., and NEVILLE, J., concurring.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

98-0195

Illinois Commerce Commission	:
	:
Investigation into Certain Payphone Issues as directed in Docket 97-0225	:

INTERIM ORDER

November 12, 2003

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

98-0195

Illinois Commerce Commission :
:
Investigation into Certain Payphone :
Issues as directed in Docket 97-0225 :

INTERIM ORDER

By the Commission:

I. Procedural History

A. Commission Proceeding and Related FCC Orders

This docket came about as a result of the enactment of Section 276 of the Telecommunications Act of 1996 ("TA96"), 47 U.S.C. §276, which establishes certain statutory provisions with respect to the provisioning of payphone services. The Federal Communications Commission ("FCC") initially promulgated rules to implement Section 276 in 1996.[1] As part of the *First Payphone Order*, the FCC held that all incumbent local exchange carriers' ("ILEC") payphones would be treated as deregulated and detariffed customer premises equipment ("CPE"). The FCC also held that ILECs must comply with the nonstructural safeguards from the FCC's *Computer III Order*,[2] and concluded that, to comply with *Computer III*, ILECs must unbundle payphone line services and file tariffs for such services that comply with the FCC's

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1 *See, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-0128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996)("*First Payphone Order*").

2 *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (Dec. 20, 1991) ("*Computer III*").

New Services Test ("NST"). (*First Payphone Order*, ¶¶146, 199-200). The FCC's NST is a cost-based test that sets the direct cost of providing a new service as a price floor and then adds a reasonable amount of overhead to derive the overall price of the service.[3] The FCC required ILECs to file tariffs in accordance with the NST for basic payphone lines at the state level only, and for unbundled features and functions at both the state and federal levels.[4]

Illinois Bell Telephone Company, d/b/a/ SBC ("SBC"), (also referred to as Ameritech, SBC Ameritech, and Ameritech Illinois), is an Illinois corporation with its principal place of business at 225 West Randolph St., Chicago, Illinois. SBC is a wholly owned subsidiary of SBC Corporation, headquartered in Chicago, which is in turn a wholly owned subsidiary of SBC Corporation, headquartered in San Antonio, Texas. SBC is an ILEC, authorized to provide local and intra-metropolitan service area ("intraMSA")

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[3] *See, Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket No. 89-79, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (July 11, 1991); *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, Mem. Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 340-47, ¶¶209-22 (Nov. 7, 1994) (defining the NST).

[4] *See, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233, 21307-09, ¶¶162-65 (Nov. 8, 1996)(*"Payphone Reconsideration Order"*).

interexchange telecommunications services in Illinois within its designated service territory.

Verizon North, Inc. and Verizon South, Inc. (collectively referred to herein as "Verizon") are wholly owned subsidiaries of Verizon Communications. Verizon Communications was formed by the merger of GTE Corporation and Bell Atlantic Corporation, which this Commission addressed in Docket No. 98-0866. Verizon is an ILEC, authorized to provide local and intraMSA interexchange telecommunications services in Illinois within its designated service territory.

On May 8, 1997, the Illinois Public Telecommunications Association ("IPTA") filed a petition requesting the Commission to initiate an investigation into ILEC compliance with the FCC's orders promulgated pursuant to Section 276 of TA96 as well as certain sections of the Illinois Public Utilities Act ("Act"), 220 ILCS 5/1-101 *et seq.* (ICC Docket No. 97-0225).

The IPTA is a trade association representing the interests of independent payphone providers ("IPPs"). IPPs purchase access to the telecommunications network from SBC and Verizon and resell that network access to the public via public payphones.

On December 17, 1997, in its *Final Order* in Docket No. 97-0255, the Commission ordered the initiation of this proceeding.[5] The Commission

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[5] Final Order, *Illinois Public Telecommunications Association, an Illinois not for profit corporation: Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public*

directed that the following matters should be investigated:

> 1. LEC compliance with the pricing provisions of the NST in the provisioning of pay telephone service;
> 2. The necessity of declaring the pay telephone services of Verizon, [Illinois Consolidated Telephone Company] and Centel (also referred to as Verizon North and Verizon South ("Verizon") competitive; and
> 3. The removal of subsidies from exchange and exchange access services.

(Initiating Order, *Illinois Commerce Commission on its own Motion: Investigation into certain payphone issues as directed in Docket 97-0225*, ICC Docket No. 98-0195 (Mar. 11, 1998)).

In addition, the Commission made the following determination:

> [T]he investigation instituted herein shall also examine the advisability and necessity of the Commission enacting formal rules governing the pricing and provisioning of pay telephone service in concert with [TA96] and the FCC's various orders addressing the pricing and provisioning of payphone service.

Utilities Act and Section 276 of the Communications Act of 1934, ICC Docket No. 97-0225 (Dec. 17, 1997).

Due to expected FCC orders on relevant issues and orders from other states on payphone matters, this proceeding was stayed generally. At a status conference convened on August 25, 1999, the parties agreed that the proceeding should be bifurcated. The first phase of this proceeding would evaluate Illinois Bell Telephone Company's and Verizon's compliance with 1) the pricing provisions of the NST in provisioning pay telephone service and 2) whether SBC and Verizon have removed subsidies from exchange and exchange access services. Compliance with these two issues by Illinois Consolidated Telephone, Gallatin River Telephone and other ILECS not covered by this Order will be evaluated in the second phase of this investigation. The issue of whether it is necessary for the Commission to enact formal rules governing the pricing and provisioning of pay telephone services was also deferred until the second phase of this proceeding.

In order to demonstrate compliance with the anti-subsidy requirement, SBC and Verizon must show through "imputation" that they are not subsidizing their own payphone operations. Imputation tests are required by 220 ILCS 13-505.1 and implemented via Code Part 792. An imputation test in effect sets a price floor for a service. Docket 88-0412 ruled that an imputation test was required for payphone services and sets out the elements of such a test. In this instance the imputation test requires that an ILEC demonstrate that its aggregate payphone revenues exceed the imputed costs for this service based on the ILEC's network routing arrangement. The ILEC must show that an IPP that must buy tariffed components from the

ILEC can fairly compete with the ILEC pay telephone unit for end users.

On December 21, 1999, SBC and Verizon filed their supplemental direct testimony and supporting schedules. On March 17, 2000, Staff filed its direct testimony. On September 5, 2000, the IPTA filed its direct testimony. The parties, thereafter, duly filed rebuttal and surrebuttal testimony.

Hearings were held on October 24-26, 2001. At these hearings testimony was taken and evidence presented into the record. At the conclusion of the evidentiary hearing, the Administrative Law Judge ("ALJ") marked the matter "heard and taken" and set a briefing schedule. All parties filed their initial briefs on January 4, 2002.

On January 31, 2002, the FCC released a Memorandum Opinion and Order (*"Payphone Clarification Order"*)[6] on an application for review from a Common Carrier Bureau order[7] that directed certain ILECs in Wisconsin to submit to the FCC their currently effective tariffs for intrastate payphone service offerings for review pursuant to the FCC's NST. The *Bureau Order* directed the parties to file an appeal with the FCC because the Wisconsin Public Service

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6 *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25 (Jan. 31, 2002)(*"Payphone Clarification Order"*).

7 *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, DA No. 00-347, Order, 15 FCC Rcd 9978 (Mar. 2, 2000)(*"Bureau Order"*).

Commission ("Wisconsin Commission") found that its state enabling statute did not provide it with authority to review ILECs' compliance with Section 276 of TA96 and the FCC's NST promulgated thereunder. The FCC also noted disparate applications of the FCC's NST in various state proceedings; and the FCC stated its intent to assist states with the correct application of the NST.

In the *Payphone Clarification Order*, the FCC held that the NST is only applicable to Bell Operating Companies ("BOCs") as a matter of law. The FCC's previous orders requiring non-BOC ILECs to file state tariffs for payphone services rates in accordance with the NST exceeded the FCC's jurisdiction. In addition, the FCC held that BOCs can base their direct costs on total element long run incremental costs ("TELRIC") or similar forward looking cost methodologies, such as total service long run incremental costs ("TSLRIC"), traditionally used by State commissions. On February 18, 2002, Verizon filed a Motion to Dismiss this case as to it in regard to its need to comply with the NST. The substance of that Motion, which is fully briefed, will be addressed in the body of this order.

Finally, the FCC also overruled the *Bureau Order's* conclusion that "UNE overhead loadings must serve as a default ceiling" for overhead loadings or that overhead loadings must be uniform. Instead, the FCC ruled that rates reflecting any of three overhead allocation methodologies should be presumed reasonable: (1) UNE loadings, (2) loading based on the methodology employed in the FCC's *Physical*

Collocation Tariff Order,[8] or (3) loadings based on the methodology employed in the FCC's *ONA Tariff Order*.[9] Different loadings also continue to be permitted if they are justified.

On July 11, 2003, the FCC's the *Payphone Clarification Order* was affirmed in all respects in *New England Public Communications Council, Inc. v. FCC, et al.*, 334 F.3d 69, (D.C. Cir., 2003).

After the FCC issued its *Payphone Clarification Order*, the Commission reopened the record in this proceeding to address the impact, if any, of the presumptions established in that order. The parties filed direct testimony, rebuttal testimony and surrebuttal testimony on reopening in accordance with the schedule established by the ALJ. On November 14 and 15, 2002, further evidentiary hearings were held. At the conclusion of those hearings the record was again marked "heard and taken." The parties filed initial briefs and reply briefs on reopening on January 10, 2003, and February 21, 2003, respectively. On June 18, 2003, a Proposed Order was served on the parties. Briefs on exceptions were filed by the parties on July 29, 2003. Reply Briefs on Exceptions were filed on September 8, 2003.

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[8] *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection through Physical Collocation for Special Access and Switched Transport*, CC Docket 93-162, Second Report and Order, 12 FCC Rcd. 18730 (June 13, 1997)("*Physical Collocation Tariff Order*").

[9] — *In re Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket 92-91, Order, 9 FCC Rcd. 440 (Dec. 15, 1993)("*ONA Tariff Order*").

It should also be noted that on June 27, 2000, the Commission also adopted revisions to Part 771 of its regulations ("Payphone Rules"), 83 Ill. Admin. Code Part 771, to maintain compliance with the FCC's requirements issued pursuant to Section 276 of TA96. The Commission promulgated Section 771.600 of its regulations, which provides that the rates ILECs charge for payphone services "shall be set according to the FCC's NST pursuant to the Computer Inquiry III (CC Docket 90-263) guidelines in effect on October 1, 1999 (47 CFR 61.49(g)(2))." The Commission's adoption of the October 1, 1999, version of the NST reflects the requirement of the Illinois Administrative Procedure Act ("IAPA") that any Illinois administrative rules that incorporate federal agency rules must specify precisely the rules being incorporated. The IAPA notes that the incorporation of federal agency standards "does not include any later amendments or additions." (5 ILCS 100/5-75(a)). As noted *supra*, the appropriateness of the Commission's Payphone Rules and the need to maintain formal rules governing the pricing and provisioning of pay telephone service in concert with TA96 and the FCC's various orders addressing the pricing and provisioning of payphone service is scheduled to be addressed in the second phase of this proceeding.

B. SBC's Tariff and Rate Filings

The Commission has addressed IPP rates and payphone competition relative to SBC in two significant proceedings. First, this Commission established the basic parameters for payphone competition in Illinois in 1985. Interim Order, Ill. C.C.

Dkts. 84-0464 & 84-0442 (cons.) (April 24, 1985). There, the Commission addressed the public utility status of IPPs, established regulatory requirements for the operation of IPP payphones, and approved the prices which SBC charged the IPPs for the network services they purchased. At that time, the Commission approved SBC's proposal to price IPP rates at the same rates as the functionally equivalent business services. That rate structure has remained in place ever since.

The Commission further developed its policies regarding the payphone industry in the IPTA's 1988 complaint proceeding. That proceeding was pending before the Commission for seven years and eventually resulted in a settlement (the "Stipulation") between SBC (then Ameritech Illinois) and the IPTA, which was reviewed, approved, and adopted by the Commission as an order on the merits. Order, Ill. C.C. Dkt. 88-0412 (June 7, 1995) (the "*1995 Payphone Order*"). In that proceeding, SBC and the IPTA agreed, and the Commission found, that payphone services provided to end users throughout SBC's service territory should be formally declared "competitive" under state law. The *1995 Payphone Order* also resolved other issues related to this proceeding, including, for example, the proper treatment of operator services revenues for purposes of performing an imputation test.

Regarding IPP rates, the IPTA and SBC agreed to a discounted rate schedule for payphone usage. The parties also agreed that "Illinois Bell's other network service offerings shall otherwise follow the rates, terms and conditions for business rates." *1995 Payphone Order*, at 18-19. The parties further agreed that those

provisions of the settlement would "extend through June 30, 2005." The Commission reviewed the settlement, approved it, and incorporated its primary terms into its final order. Regarding rates, the Commission endorsed the parties' agreement, but preserved the possibility of reviewing the discounted usage rate schedule "for compliance with the Act's requirements such as satisfaction of the statutory imputation tests." The Commission thus ordered that retail business rates would govern IPP services generally, and that the agreed usage rates would continue to apply to payphone usage, through June 30, 2005.

Because SBC had already tariffed its payphone services, and because those tariffs had already been reviewed and found reasonable by the Commission, SBC did not file any new tariffs with the Commission in compliance with the *Payphone Clarification Order*. Instead, SBC supplied additional cost documentation on May 15, 1997. That documentation was accepted by the Commission.

C. Verizon's Tariff and Rate Filings

Verizon's pay telephone operation obtains network access from both Customer Owned Coin Telephone ("COCOT") service and Coin Line service. COCOT service is the provision of a line that provides dial tone, and is the equivalent to the line provided to a single line business customer. COCOT service is typically purchased when a pay telephone provider wants to utilize "intelligent" or "smart" payphones that contain the capability to screen for coin collection

and return, answer supervision and "store and forward" automated operator services. Coin Line service is purchased when a pay telephone provider connects a "dumb" payphone to the line, and utilizes the intelligence at a LEC's central office, which is necessary to accomplish those functions described above.

The rate for Verizon's COCOT service was approved by the Commission in Verizon's last general rate case. (ICC Docket Nos. 93-0301/94-0041, *consol.*) The Commission did not suspend Verizon's Coin Line rate, which was filed on January 15, 1997. (*See*, Ill. C.C. No. 9, Section 2, Sheet Nos. 5-6 (Verizon North Inc.); Ill. C.C. No. 3, Section 7, Sheet No. 55 (Verizon South Inc.)). On May 19, 1997, Verizon filed supplemental documentation in accordance with the FCC's directives. Verizon reduced its rates for Billed Number Screening, Selective Class of Call Screening and the Alltel COCOT line pursuant to the FCC's NST. Verizon payphone services were declared competitive on October 7, 1997.[10] The Commission did not act to suspend the tariffs. Consequently, as a matter of law, Verizon's payphone services are competitive and the competitive status of these services is not at issue in this proceeding.

II. The Imputation Test

The Commission has, under the authority of Sections 13-505.1 and 13-507 of the Act, promulgated rules to prevent cross-subsidization and to determine

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[10] *See*, Ill. C.C. No. 11, Section 15, Sheet No. 1 and Ill. C.C. No. 4, Section 5, Sheet No. 1.

costs of service. *See, generally,* 83 Ill. Admin. Code 791.10 *et seq.*; 83 Ill. Admin. Code 792.10 *et seq.* SBC and Verizon must demonstrate that their payphone rates do not subsidize their own payphone operations. This is done through imputation, the process of determining whether the aggregate revenue of certain services an ILEC provides to other telecommunications carriers, in this case IPP's, exceeds the imputed costs for such service. The imputation test requires that an ILEC show that an equally efficient competitor that must buy tariffed components from the ILEC, can fairly compete with the ILEC's pay telephone unit for end-users. The test is intended to guard against cross-subsidization of competitive services by non-competitive services.

A. SBC's Imputation Analysis is Uncontested

SBC presented evidence showing that its payphone services satisfy the imputation test. Neither Staff nor the IPTA contended that SBC's payphone services fail to pass that test. Accordingly, SBC argues, the record demonstrates that SBC's does not subsidize its payphone services.

B. Verizon's Imputation Analysis

1. Verizon's Position

Verizon prepared an initial imputation test based on 1998 data purporting to demonstrate Verizon's revenues associated with Verizon's payphone operation exceeded costs. During the rebuttal testimony phase of the process, Verizon

withdrew its 1998 imputation test and presented an updated imputation test that utilized data from 1999. Pursuant to an agreement between the parties, Verizon included overhead expense in its calculations; even though neither the Act nor the Commission's regulations require the inclusion of overhead expense. Verizon argued that its imputation analysis was therefore stricter than Section 13-505.1 of the Act requires.

Verizon notes that it is uncontested that overhead expense is not a cost that is required by the Act or the Commission's regulations to be included in imputation analyses. Verizon contends it passes the imputation test when overhead expense is removed from the calculation. Overhead expense is included in the Corporate Expense account in Verizon's imputation analysis. The removal of the entire account, net of taxes, produces a positive passing margin for Verizon.

Accordingly, it is Verizon's position that the evidence supports a Commission finding that Verizon passes the test based on the legally applicable standard. Verizon explains that the propriety of including a credit to Verizon's Corporate Expense account for pension settlement gains in the test year 1999 is moot when the legally applicable standard for imputation analyses is employed. Verizon emphasizes that the pension settlement gains credit was included as part of Verizon's Corporate Expense account, the account that represents overhead expense.

Verizon asserts that corporate overhead expenses are not part of the standard established by the

Act and the Commission's regulations. Supposed omissions cannot be added, conjectural defects remedied, or new or different provisions annexed to a statute that change the law. Verizon further explains that the Commission cannot impose standards not included in the adopted regulatory framework because administrative agencies cannot exercise legislatively empowered authority in a discriminatory, arbitrary or capricious manner.

Verizon argues that it has no incentive to subsidize its payphone operation. The rates Verizon charges to its own payphone operation are the same rates that Verizon charges IPPs. Verizon cannot assess its own payphone operation unreasonably low rates in the hope of gaining a competitive advantage because Verizon would have to confer the same advantage on its competitors, the IPPs. Accordingly, Verizon lacks any incentive to attempt to subsidize its own payphone operation.

2. Staff's Position

Staff does not agree that Verizon has satisfied the imputation test. Staff notes that the parties agreed that the imputation tests provided by these ILECS would contain overhead costs that are not normally used in imputation tests for retail services. Therefore, the standards for this test were much higher than for a normal imputation test.

Verizon's witness conceded that Verizon's payphone rates would not pass imputation if the pension settlement gains were not included to reduce

the expenses. Based on this revelation, Staff maintains that Verizon must increase its payphone rate to its own subsidiary so that it can pass the imputation test and show that the new rate does not give its subsidiary a competitive advantage over IPPs.

Staff argues that Verizon's imputation test and related testimony do not prove that it is not subsidizing its coin services with revenues from other services. Staff recommends that the Commission require Verizon to increase its rates to ensure that Verizon's revenues exceed costs.

3. IPTA's Position

IPTA also contends that Verizon's payphone operations do not pass imputation. Initially, Verizon witness Olson presented an attachment to his direct testimony that purported to show that Verizon passed an imputation test in 1998. Verizon later submitted a revised imputation test for 1999 and withdrew the 1998 imputation analysis. IPTA contends that the test based on 1998 data was likely withdrawn because it would not have withstood scrutiny. According to Verizon, assuming all of its calculations are correct, Verizon's payphone operations generated a small amount of revenue in excess of total imputed costs in 1999. IPTA contends that Verizon's calculations are not correct. The IPTA says the study failed to include several significant expenses. When these inclusions are made, Verizon's payphone operations fail imputation.

For instance, IPTA takes issue with Verizon's offset of its Corporate Operations expense in its 1999

imputation analysis by allocating a one-time pension gain to the Company's non-regulated corporate operations expense accounts (the Company's non-regulated corporate operations include services in addition to payphone services.) IPTA argues that the pension gain is not a forward-looking cost as required under the Commission's Long-Run Service Incremental Cost ("LRSIC") rules, but rather a one-time occurrence.

IPTA points out that Commission's rules define a recurring cost as a cost that will continue throughout the revenue producing life of the service. Part 792.20(m). The pension gain at issue is not likely to recur. It is totally inappropriate to include a one-time gain in a forward-looking imputation analysis. Verizon acknowledged that if the one-time gain were disallowed, Verizon would fail the imputation analysis

IPTA asserts that Verizon's analysis also fails to impute the tariffed rate per line per month for the PICC that Verizon imposes on IPPs that do not presubscribe to a particular IXC. The PICC is a federally imposed charge designed to help the LEC recover a portion of the non-traffic sensitive cost incurred in providing services to access line subscribers. The charge is assessed when a customer chooses to presubscribe to a particular interexchange carrier. Conversely, Verizon also assesses a no-PICC charge to IPPs when an IPP chooses not to presubscribe to an interexchange carrier. Furthermore, because IPPs have very few 1 + interLATA calls per month, interexchange carriers will almost uniformly pass the PICC charge to the IPP. According to the IPTA however, Verizon, failed to impute these PICC/no-PICC rates to its own payphone

operations in its imputation analysis. By failing to impute the PICC charge, Verizon under reports its imputed costs by a substantial margin.

In addition, according to IPTA, Verizon's analysis does not impute to its payphone operations the per-line per-month charges it assesses IPPs for answer supervision and for call screening and blocking. Similarly, says IPTA, Verizon failed to substantiate its imputation analysis with regard to costs associated with extended area service ("EAS") for semi-public phones or the costs associated with that usage sensitive service.

IPTA contends that all costs and revenues associated with Verizon's semi-public phones should be included in its imputation analysis. Verizon's imputation test substantially under-reports the appropriate imputed rates. IPTA states that Verizon has failed to comply with Part 792, Section 13-505.1 of the Act, Section 276, or the FCC's Orders.

IPTA argues that the Commission should order that Verizon decrease its payphone operations expenses through a reduction in the tariffed rates imputed under Part 792. IPTA points out that the Company failed to provide any evidence with regard to the years 1997, 1998 and 2000. IPTA urges the Commission to assume that Verizon failed imputation in those years as well. IPTA recommends that this Commission adopt the IPTA's proposed rates under the NST analysis. In order to satisfy an imputation analysis for 1997, 1998 and 2000, the same rates proposed by the IPTA should be made effective back to

the time Verizon's payphone services were reclassified as competitive. IPTA contends its IPPs should receive a refund or credit dating back to April 1997. In other words, because Verizon must charge IPPs the same rates as Verizon imputes to its payphone operation, should the Commission lower Verizon's imputed tariffed rates, the rates Verizon charges IPPs would be lowered by the same amount. The IPTA contends that its IPP's should receive a refund of the excess amounts they have paid due to the higher rates.

4. Verizon's Reply

Responding to the additional adjustments recommended by Staff and the IPTA, Verizon argues that imputing any additional PICC expense to Verizon's payphone operation would cause Verizon's costs to be substantially overstated. The PICC is a federally imposed charge that is only assessed on end users that are not presubscribed to IXCs. Only a small number of Verizon's payphones are not presubscribed. Verizon correctly imputed the PICC for its lines that are not presubscribed. Verizon states that the Commission should not require Verizon to impute any additional PICC expense for Verizon's remaining payphones because those phones are presubscribed.

Additionally, Verizon argues that further charges for answer supervision, call screening and call blocking should not be imputed to Verizon's payphone operation. Charges for answer supervision, call screening and call blocking are assessed when COCOT service is utilized, i.e., "dumb" payphones are attached to lines, because dumb payphones receive those

services from Verizon's central office. Verizon imputed those costs for the number of dumb payphones it has in service. Verizon states that imputing those costs for any additional payphones would improperly overstate its costs.

Verizon further asserts that it would be improper to impute costs associated with Extended Area Service ("EAS") and usage for semi-public phones to Verizon's payphone operation. Owners of semi-public phones are not required to obtain Certificates of Public Convenience and Necessity from the Commission. Verizon records revenues from its provisioning of semi-public phones in regulated accounts, not as part of its payphone operation. Accordingly, Verizon asserts that costs associated with semi-public phones should not be imputed to Verizon's payphone operation because revenues associated with semi-public phones are not imputed.

Next, Verizon addresses the IPTA's assertion that Verizon's passage margin is "meager." Verizon points out that the statute does not prescribe any particular margin of passage. Verizon also explains that a passage margin would not serve the legislatively stated purpose of the imputation test, which as delineated in Section 13-505.1 of the Act is "to determine whether the aggregate revenue for each service exceeds costs." Verizon argues that any issue pertaining to passage margin is a "red herring."

Verizon notes that the revenues utilized in its imputation analysis were derived from a coin drop rate of 35 cents, which was Verizon's rate at the time it filed

its analysis. Verizon increased its coin drop rate to 50 cents during this proceeding. (*citing* Ill. C.C. No. 11, Section 15, First Revised Sheet No. 1; Ill. C.C. No. 4, Section 5, First Revised Sheet No. 1). Verizon explains that the revenues it derives from its 50 cent coin drop rate are significantly greater than reflected in the 35 cent coin drop rate utilized in Verizon's imputation analysis. Verizon comments that acknowledgement of the additional revenues it derives from its 50 cent coin drop rate establishes that Verizon passes the imputation test by a significant margin.

Finally, Verizon contends that the IPTA is seeking an improper subsidy in this proceeding. Verizon points out that Section 505.2 of the Act provides that Verizon cannot discriminate in its provisioning of service by charging different carriers (including itself) different rates. If the Commission adopts the IPTA's recommendation to lower Verizon's tariffed rates imputed to Verizon's payphone operation, Verizon would have to lower the rates charged to IPPs by the same amount. Verizon argues that a subsidy would distort the market and be contrary to the Commission's long-standing policy that the cost-causer pays. Verizon notes Staff's agreement with these positions, and Staff's concurrence that it would be inappropriate for the Commission to create the subsidy requested by the IPTA in this proceeding.

C. Commission Analysis and Conclusion

The Commission finds the current imputation standard, as contained in Section 13-505.1 of the Act and 83 Illinois Administrative Code Part 792, is the

most appropriate means to determine whether Verizon and SBC satisfy the federal requirement that payphone operations not be subsidized by noncompetitive service offerings. The parties to this proceeding developed a general framework for the payphone imputation test to be used for this purpose in a collaborative workshop. The agreed upon framework is contained in Attachment 2.11 to Staff Exhibit 2.1.

Staff and the IPTA agree that SBC's payphone services have passed the imputation test. Therefore, the Commission finds that SBC has passed the imputation test.

Staff and the IPTA note several deficiencies in the imputation test provided by Verizon. The IPTA claims that when these deficiencies are corrected, Verizon fails the imputation test. Staff agrees with some of the adjustments proposed by the IPTA, but is equivocal about whether Verizon has failed or passed the test. The alleged Verizon deficiencies listed by IPTA are the following:

- That the pension gain in question inappropriately offsets corporate overhead expenses.
- That Verizon fails to impute PICC charges as an expense.
- That Verizon fails to impute certain costs for semi-public payphones as an expense.
- That Verizon fails to impute E-911 surcharges as an expense.
- That Verizon fails to impute answer supervision rates as an expense.

- That Verizon fails to impute call screening and blocking rates as an expense.

Based upon its review of the record, the Commission assessment of the issues raised by the IPTA is as follows:

The Commission finds that the corporate overhead expenses shown by Verizon as a negative expense should not be included in the imputation test. Corporate overhead should not be included as part of an imputation test, except where the rate for a service that is imputed into the test incidentally includes some allocation for overhead expenses.

Secondly, the Commission finds that Verizon's treatment of the pension settlement gains credit in the 1999 test year is inappropriate. The parties to this proceeding, including Verizon, stipulated to the inclusion of certain overhead expenses as part of the imputation analysis. The pension credit is an offset to the Corporate Expense account that represents overhead expense. However, the pension credit is not a forward-looking cost as required under the Commission's LRSIC rules, but rather a one-time occurrence. Commission rules define a recurring cost as those costs that will continue throughout the revenue producing life of the service. Part 792.20(m). It is inappropriate to include such a one-time gain in a forward-looking imputation analysis. Therefore, the Commission finds that a value of zero should be included for corporate overhead expense in Verizon's test.

The Commission finds that for imputation purposes, Verizon's treatment of PICC charges and E-911 surcharges is appropriate. The IPTA incorrectly assumes that the imputation test should include a charge for all customers for these two items. In the case of the PICC, only lines that are not pre-subscribed would require a charge. Otherwise, the PICC is charged to the pre-subscribed IXC and should not be reflected in the imputation analysis. Whether or not an IXC passes through its PICC to the payphone provider is a non-issue. What matters is that the payphone provider is not confronted by the ILEC with this charge when pre-subscribed.

The Commission finds persuasive Verizon's argument that E-911 surcharges are merely passed between its semi-public payphone customers and the 911 systems. A competitive provider of semi-public payphone service would also merely collect and remit the surcharge. As such, the ILEC faces no costs for E-911 services when providing semi-public payphones and the imputation test should reflect this.

The Commission finds that Verizon should include certain semi-public payphone expenses in its calculations. As the IPTA has noted, specifically identified costs associated with provisioning EAS calls over semi-public phones have not been included in Verizon's calculations. Verizon acknowledges that revenue for this service is included in the test but that the associated costs are not. The Commission disagrees with Verizon's argument that semi-public revenue and costs should not be a part of the test. Without including both the revenue and costs for semi-public

telephones in the imputation test, we cannot determine whether all payphone services are not subsidized by noncompetitive services. The only alternative solution would be to have two separate imputation tests - one for public payphones and the other for semi-public phones. No party in this proceeding proposed a bifurcation of the test. Therefore, the Commission has determined, in this instance, that it is appropriate to include both revenue and cost information for public and semi-public payphones in one imputation test. We accept the IPTA calculation of $103,408.20 for these adjustments.

The Commission does not agree with IPTA's arguments that Verizon must impute answer supervision and call screening and blocking expenses. These are optional services that do not affect the ability of payphone providers to compete with Verizon. These expenses only arise when a payphone provider finds it more advantageous to order the service than to do without. Therefore, no adjustment to the imputation test is needed for this item.

In summary, we find that Verizon's imputation test must be altered in two significant ways. First, the value for corporate overhead expense must be changed to zero. Second, the adjustments noted above for EAS expenses for semi-public payphones must be included in the test. The impact of these two changes is that Verizon's total imputed operating expenses increase substantially. When these changes are incorporated, according to our calculations, Verizon's payphone offerings fail imputation by $99,326. Therefore, we find that Verizon has not passed the imputation test.

The Commission does not agree with IPTA's argument that Verizon should be required to make refunds or provide credits to IPPs because of Verizon's failure to pass the imputation test. As explained later in this Order, Illinois law does not permit refunds to IPPs in this case. The purpose of the imputation test is to determine whether cross-subsidization is occurring. Although we have determined, based upon 1999 data, that cross subsidization was occurring, we can only address that on a forward looking basis. Verizon it has increased its coin drop rate from $0.35 to $0.50 voluntarily. As a result of this occurrence and decreases herein ordered for payphone access rates, Verizon's pay phone rates pass imputation. The Commission views this as a sufficient solution to the cross subsidization problem and does not order any further remedy.

III. The NST

The FCC established the NST under the authority of Section 276 of TA 96. *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, FCC Docket Nos. 96-128, 91-35, and 96-439, Order On Reconsideration* (November 8, 1996) (hereafter, "Order on Reconsideration"). Specifically, the *Order on Reconsideration* provides that:

> We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate and

interstate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features they provide to their own payphone services. The tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the *Computer III* guidelines for tariffing such intrastate services. States unable to review these tariffs may require the LECs operating in their state to file these tariffs with the Commission. In addition, LECs must file with the Commission tariffs for unbundled features consistent with the requirements established in the Report and Order. LECs are not required to file tariffs for the basic payphone line for smart and dumb payphones with the Commission. We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276. As required in the *Report and Order*, and affirmed herein, all required tariffs, both intrastate and interstate, must be filed no later than January 15, 1997 and must be effective no later that April 15, 1997. Where LECs have already filed intrastate tariffs for these services, states may, after

> considering the requirements of this order, the *Report and Order*, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the *Report and Order* as revised herein; and 2) that in such case no further filings are required. We delegate authority to the Common Carrier Bureau to determine the least burdensome method for small carriers to comply with the requirements for the filing of tariffs with the Commission, such as those suggested by NTCA.
>
> Order on Reconsideration, ¶ 163.

The NST, codified at 47 CFR 61.49(g), is intended to establish a price ceiling for noncompetitive pay telephone services. The test requires that when an ILEC submits a tariff filing introducing a new service or a restructured unbundled basic service element ("BSE") that is or will later be included in a basket, that filing must be accompanied by cost data sufficient to establish that the new service or unbundled BSE will not recover more than a just and reasonable portion of the carrier's overheard costs. To satisfy the test, the ILEC must demonstrate that the rates for its pay telephone services exceed LRSIC, so that the new service is not being subsidized. The underlying objective of the NST is to give all market participants in the pay telephone industry, ILECs and IPPs, a fair opportunity to compete. In other words, the NST requires ILECs subject to the Test to demonstrate that

their rates for payphone services are cost-based, and non-discriminatory.

A. SBC and the NST

1. SBC's Threshold Argument - Its IPP Rates Are Frozen

Preliminarily, SBC argues that the Commission should not change the structure of SBC's IPP service rates until at least June 30, 2005 because of a Commission approved stipulation in Docket 88-0412, between the IPTA and SBC (then Ameritech Illinois). Ameritech Illinois and the IPTA agreed to a rate schedule for payphone usage. They further agreed that other IPP service rates would track business rates. The parties agreed that those and other provisions of the settlement would "extend through June 30, 2005."

The Commission adopted the parties' agreement regarding rates, while retaining the right to review the discounted usage rate schedule at some point before June 30, 2005 "for compliance with the Act's requirements such as satisfaction of the statutory imputation tests."

SBC argues that the proviso regarding the possible review of usage rates is not relevant to this proceeding, because the NST is not imposed by the Act and any change in the terms of the Stipulation or the *1995 Payphone Order* would be improper for several reasons. First, SBC asserts, Illinois law does not permit the Commission's orders to be collaterally attacked. Second, SBC contends that both state and federal law

favor the enforcement of settlement agreements. Finally, SBC argues that the *1995 Payphone Order* estops the Commission from altering its terms. Estoppel operates against public bodies where there is "an affirmative act on the part of the public entity and the inducement of a substantial reliance by the affirmative act." *Gersch v. Illinois Dept. of Professional Regulation,* 308 Ill. App. 3d 649, 660 (1st Dist. 1999). SBC has acted in reliance on the Commission's order. Therefore, according to SBC, the Commission is not now free to alter that term. See *Hickey v. Illinois Central R.R. Co.*, 35 Ill. 2d 427, 448-49 (1966); *People v. Hill*, 75 Ill. App. 2d 69, 75 (1st Dist 1966).

2. Staff and IPTA Argue that State and Federal Law Require that the Commission's Previous Order Be Set Aside

In response, Staff and the IPTA argue that intervening changes in law and policy negate the terms of the Stipulation and the *1995 Payphone Order*. They contend that both state and federal law mandate the application of the NST to ILECs. Specifically, Section 276 of TA 96 (47 U.S.C.A. 276(c) specifically preempts any state regulatory order inconsistent with its requirements. Pursuant to the Act, in 1996 the FCC issued the First Payphone Order and the Payphone Reconsideration Order, both of which require LECs to set payphone access rates in compliance with the NST. They point out that this Commission adopted 83 Ill. Admin Code Part 771.10 et seq, mandating that the NST be applied to LEC payphone access rates in Illinois. Therefore, both SBC and Verizon are required

to convince the Commission that the direct costs and the overhead allocations embedded in their current tariffed rates comply with the FCC's New Service Test and with Illinois law.

Moreover, the Order in Docket 88-0412 specifically held that the ordering of usage rates "does not prevent investigation of those rates during the term identified for compliance with the Act's regulations."

B. Verizon and the NST

1. Verizon Contends it is Not Subject to the NST

It is Verizon's position that the Commission should not apply the FCC's NST to Verizon. Verizon points out that there is no legal requirement for the Commission to apply the NST to Verizon's payphone line rates. The FCC explicitly stated:

> In sum, we require that BOC payphone line rates be cost-based, in accordance with the standards set forth below. It is important to note that we require *only BOCs, and not LECs generally,* to provide payphone lines at cost-based rates. Because sections 276(a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the [FCC] exercise jurisdiction over the intrastate payphone prices of non-BOC LECs. Since there are statutory provisions that

> empower us to apply the new services test to payphone line rates and grant us that authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates.
>
> *Payphone Clarification Order*, ¶ 42 (emphasis added).

Verizon argues that this passage from the FCC's Payphone Clarification Order makes clear that the FCC does not have the jurisdiction to impose the NST on non-BOC LECs. Verizon seeks a resolution of all matters pertaining to the NST in regard to Verizon through a Commission decision that the NST will not be applied to Verizon in Illinois. Verizon notes that both Staff and the IPTA have stipulated that Verizon is not a BOC in Illinois, Verizon concludes that the Commission is under no legal obligation to apply the FCC's NST to Verizon's payphone rates in Illinois. This is the same argument raised by Verizon's partial Motion to dismiss.

Verizon explains that there already is competition in its service territory. IPPs hold 40% of the market in Verizon's service territory. Even after Verizon's sale of approximately 109,000 access lines in 2000 and, thus, a significant reduction in the size of Verizon's service territory, IPPs operated more payphones in Verizon's territory in the year 2000 than in 1996. Verizon's expert witnesses attested to the fact that Verizon's rates are not acting as a barrier to market entry.

Second, Verizon asserts that its payphone rates have been demonstrated to be reasonable - the FCC's stated purpose for the NST. Verizon notes that the markups included in its rates are significantly lower than those found in some competitive markets.

Verizon states that the correct market pressures and incentives also exist for Verizon to maintain its rates at reasonable levels. Like IPPs, Verizon's payphone operation also faces significant competition from wireless carriers. Verizon charges its own payphone operation the same rates that Verizon charges IPPs. If Verizon were to charge unreasonably high prices to IPPs, Verizon would have to charge its own payphone operation the same high prices, which would have a negative impact on its ability to pass the imputation test and its ability to compete against wireless carriers.

Verizon concludes that applying the NST to Verizon would amount to unnecessary regulation. Verizon also states that the NST duplicates the Commission's own regulatory efforts.

2. Staff Urges the Commission to Apply the NST to Verizon

Staff argues that the FCC has encouraged state commissions to apply the NST services test to all LECs. Staff notes that Verizon is the dominant provider in its area. Staff also argues that apart from the NST, the Commission's Cost of Service Rules require that ILECs must demonstrate compliance with LRSIC, an analysis that for Commission purposes is identical to the NST.

For these reasons, Staff argues that the NST should be applied to Verizon. The arguments that it should not be subject to the NST are not compelling. As noted, the Commission, in its March 11, 1998 Initiating Order, specifically stated that this proceeding was convened to investigate, among other things LEC compliance with the pricing provisions of the NST in provisioning pay telephone service;

Staff asserts that the FCC clearly stated that is did not intend, and in fact did not even desire, state Commissions to necessarily decline to apply the NST to non-BOC ILECs. The FCC has made this clear:

> We ... encourage states to apply the new services test to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines.
>
> *Payphone Clarification Order*, ¶42.

Staff points out that Verizon's argument that IPPs operated, as of 1999, over 35% of the payphones in Verizon territory means that Verizon operates the other approximately 65%[11] of the phones in its territory.

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[11] Verizon's current position is that "PSPs [have] captur[ed] almost 40% of the market in Verizon's service territory[.]" Verizon Ex. 15.0 at 7. Thus, Verizon, by its own admission, and as of July 26, 2002, retains over 60% of the market. Moreover, this state of affairs seems likely to continue, in as much as Verizon, based upon Mr. Dye's testimony, has lost less than 5% of market share between 1999 and the filing if his testimony in mid-2002.

Moreover, the "provision of payphone lines" appears, as a practical matter, to mean the provision of lines to IPPs as well. It cannot be doubted that Verizon is "dominant". The bottom line is that the Commission's Initiating Order clearly discloses an intention to apply the NST to *all* ILECs.

Moreover, Staff contends that while Verizon has presented evidence that payphone services it provides to IPPs are priced consistent with its charges to its own payphone division, this is by no means undisputed. *See, e.g.*, IPTA Ex. 2.1 at 13-16 (disputing the assertion[12] that Verizon charges identical rates to its payphone division as it does to IPPs). The same is true of its markups to IPPs. Thus, Verizon's assertions that its pricing achieves the goals of the NST cannot be viewed as conclusive.

Further, even if the NST had never been invented, Verizon would remain subject to the Commission's Cost of Service rules. *See* 83 Ill. Admin. Code 791.10, *et seq.* Staff contends that to demonstrate compliance with these rules, an ILEC must demonstrate that the rates for its pay telephone services exceed the LRSIC, so that the new service is not being subsidized. 83 Ill. Admin. Code 791.90. This is an analysis scarcely different from the NST.

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12 *See, e.g.*, Verizon Ex. 15.0 at 6.

3. IPTA Agrees that Verizon is Subject to the NST

The IPTA also asserts that the Commission is legally required to apply the FCC's NST to Verizon, citing Section 771.600 of the Commission's regulations. The regulation states that the FCC's NST applies to all ILECs in Illinois, including those ILECs that are not BOCs. The IPTA argues that case law requires that the Commission must give the language of the regulation its plain and ordinary meaning.

The FCC's Common Carrier Bureau has held that the NST requires that LECs use forward looking economic cost (i.e. LRSIC) as the basis to determine the LEC's direct cost of provisioning a service. *Payphone Clarification Order*, ¶ 4. The *Payphone Clarification Order*, at 11 also makes clear that the NST requires a LEC to use the same overhead allocation factor as it uses in pricing their UNEs, unless the LEC justifies a variation in its tariff filing and supporting work papers.

IPTA contends that the *Payphone Clarification Order* provides clear and direct guidelines on how this Commission should apply the NST pricing standard in adjudicating this investigation. The *Payphone Clarification Order* states that "[t]o satisfy the new services test, an incumbent LEC filing payphone line rates must demonstrate that the proposed rates do not recover more than the direct costs of the services plus a just and reasonable portion of the carrier's overhead costs." *Payphone Clarification Order*, ¶ 9; citing 47 C.F.R. 61.49(g)(2). The *Payphone Clarification Order* further reiterated that to comply with the NST, the direct costs

of a LEC's payphone service must be based on a consistent, forward looking economic cost methodology. *Payphone Clarification Order*, ¶10[13]

IPTA argues that the appropriate overhead allocation in applying the NST to payphone access rates, as enunciated in the *Payphone Clarification Order, is* clearly the UNE overhead rate. IPTA asserts that this Commission is prohibited from adopting overhead allocations that vary from the LEC's overhead allocations under the NST unless the LEC satisfactorily explains the need for such a variance.

C. Commission Analysis and Conclusion

1. SBC and the NST

We find that the NST requires all LECs subject to its terms to have tariffed rates in effect for payphone access services that are based on the direct cost of that service, plus a just and reasonable overhead allocation. 47 C.F.R. 61.49(g)(2). Furthermore, 83 Ill. Admin. Code Part 771.600 mandates that all Illinois LECs must price their payphone access services at rates that are: a) cost based; b) consistent with the requirements of Section 276

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13 "With respect to the calculation of direct costs, our longstanding new services test policy is to require the use of consistent methodologies in computing direct costs for related services. [fn] Cost study inputs and assumptions used to justify payphone line rates should, therefore, be consistent with the cost inputs used in computing rates for other services offered to competitors." *Payphone Clarification Order*, ¶ 9 (footnote 19 in the above quote cites to *"Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996)."

of the Communications Act of 1934 as amended by the Telecommunications Act of 1996, 47 USC 276; and c) without preference or discrimination in favor of the LEC's pay telephone service.

We now consider SBC's argument that our 1995 Payphone Order trumps Section 276. The settlement adopted by the ICC's 1995 Payphone Order required SBC Illinois to, among other things, discount its IPP usage rates, pay operator services commissions to IPTA members at agreed rates, and abandon its positions on all of the other contested issues pending in Docket 88-0412. According to SBC, it complied with all these requirements in reliance on the ICC's order which included a 10-year term of the provision governing IPP rates.

SBC argues that the parties' reliance on the Order and eight years of compliance with the terms thereof, estop the Commission from altering its terms prior to 2005. ..Staff and the IPTA stress that Section 276 specifically preempts prior inconsistent state action. Thus, the question at hand is the continued viability of the parties' stipulation (as adopted by our Order in Docket 88-0412) in light of the enactment of Section 276 of the federal act.

Congress may preempt state law in an area by stating so in explicit language and by setting out a comprehensive scheme of regulation as it has done in regard to Section 276 with regard to any state requirements that are inconsistent with the FCC regulations adopted pursuant to the statute. There are no exceptions in Section 276 applicable to this situation.

The construction of a settlement agreement is, in many respects, a matter of contract interpretation. On this issue, SBC cites abundant authority to show that settlement agreements are to be encouraged and given full force and effect. However, to the extent SBC seeks strict enforcement of the settlement, and an Order affirming the continued viability of the agreement, without review or possible modification to conform to the law, we must decline.

First of all, as Staff points out in its Reply Brief on Exceptions, contracts such as the one incorporated in our 1995 Order, that would allow SBC to violate a statute, are void and unenforceable. Moreover, what is at issue is not a mere contract or settlement, but a settlement that has been incorporated and adopted in an ICC Order. That settlement, and our Order approving it, are not impervious to legislative modification.

For example, in *Railway Employees, et al v. Wright*, 364 U.S. 642, at 651 (1961), the Supreme Court, in a decision overturning the lower court's denial of a motion to modify a consent decree to conform it to modifications to the statute relevant to the decree, held that the Court must be free to modify the terms of the consent decree when a change in law brings those terms in conflict with statutory objectives. The Court quoted from *United States v. Swift & Co., 286 U.S. 106, 114*, (1932) which stated:

> We reject the argument for the intervenors that a decree entered into upon consent is to be treated as a contract

> and not as a judicial act. . . . [W]hat was then adjudged was not a contract as to anyone. The consent is to be read as directed towards events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

These cases stand for the proposition that an Order approving a settlement cannot restrict the obligation to modify that Order to comply with modifications in the law which, as in this case, the Commission is specifically mandated to apply.

We therefore, disagree with SBC's argument that we are prohibited from setting rates in this proceeding that comply with the NST due to our issuance of an Order adopting the terms of a settlement agreement in Docket No. 88-0412. Section 276 and the FCC's *Payphone Orders* require that payphone rates be cost based. The Order in 88-0412 was issued in 1995, prior to Congress' adoption of Section 276. To the extent that the Order in 88-0412 adopts rates that are not consistent with the NST, Section 276 preempts that determination. Further, we specifically held in our Order in 88-0412 that the rates adopted therein do "not prevent investigation of these rates during the term identified for compliance with the Act's requirements ..."

2. Verizon and the NST

The Commission finds that it should determine whether FCC's NST should be applied to Verizon and ultimately other non-BOC ILECs, given the FCC's recent clarification that State Commissioners are not legally obligated to apply the NST to non-BOC ILECs.

The Commission believes that it is appropriate, as a matter of policy, to apply the NST to Verizon in Illinois. In the interest of consistency and uniform regulation, the Commission finds that it is appropriate to require Verizon to comply with the NST as it has been articulated in the FCC decisions discussed above. The FCC has encouraged state commissions to apply the NST services test to all LECs. Verizon is the dominant provider in its area. Moreover, the Commission agrees with Staff that its Cost of Service Rules require that ILECs must demonstrate compliance with LRSIC, an analysis that for Commission purposes is identical to the NST.

IV. Applying the NST

A. SBC's Position

1. Current Rates Should Be Retained or Rates Should Be Based on the Physical Collocation Order

SBC argues that because its tariffs had been reviewed and approved by the Commission, they were *per se* just and reasonable in 1997. Furthermore, they

remain so, unless and until the Commission enters orders that they be changed under both federal and state law. *See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932); *Independent Voters of Illinois v. Commerce Comm'n*, 117 Ill. 2d 90 (1987); *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205 (1954).

SBC notes that the rates approved in that order were consistent with the FCC's general approach to IPP services at that time. SBC argues that this Commission has long shared the FCC's view that services provided to IPPs are retail services. In Dockets 84-0464 and 84-0442 (consolidated), SBC proposed IPP service rates based on comparable retail services. As discussed above, SBC and the IPTA agreed that IPP rates should generally track business rates (with the exception of the discounted usage rate schedule) in Docket 88-0412, and the Commission approved those rates through and including June 30, 2005.

SBC argues that its IPP rates remain just and reasonable today, even after the FCC's January 31, 2002, *Payphone Clarification Order*. This is so, it says, because the Payphone Clarification Order merely creates a presumption that rates using the approved methodologies are just and reasonable. SBC contends that the "upper bound" of the NST is sufficiently flexible to permit other rates to be approved as well. SBC argues that the presumptions created by the *Payphone Clarification Order* can be overcome by showing, by a preponderance of the evidence, that higher allocations are appropriate.

SBC observes that the FCC based its conclusions in the *Payphone Clarification Order*, on the assumption that payphone line services are noncompetitive services that IPPs could obtain only from the LEC. That is not the case in SBC's service territory, either as a matter of law or as a matter of fact. Section 13-502(b) of the Act classifies all business services, including services provided to IPPs, as competitive. Moreover, from a factual perspective, a substantial number of IPP lines are provided by competitive local exchange carriers ("CLECs") through a "payphone unbundled network element ("UNE") platform" offering that allows CLECs to provide payphone lines to IPPs at competitive rates.

If the Commission does not continue to approve SBC's existing IPP rates, SBC requests that the Commission adopt rates based on the overhead allocation methodology developed by the FCC in the Physical Collocation Tariff Order and subsequently applied to IPP rates in the *Payphone Clarification Order*. The Physical Collocation Tariff Order requires that the level of overhead allocation be determined by subtracting the "direct costs of providing" service to end users, not the rates for providing service to competitors from the end users' rates.

SBC argues that in the *Payphone Clarification Order* (¶ 53), the FCC explained that this methodology would limit the overhead allocations in IPP rates "to the lowest overheads applied by LECs to competitive services." The services offered by the SBC payphone unit to end users are the correct "competitive" services

for purposes of this analysis, because those are the services for which SBC and the IPPs compete.

SBC's witness testified that, consistent with the Physical Collocation Tariff Order, his overhead loading analysis uses the LRSICs of the services that compete with the independent payphone providers. Consequently the overall "margin" or overhead allocation attributable to SBC's Payphone operations should be computed by using the direct (LRSIC) costs of all of the inputs into those operations and comparing them to the revenues presented in the imputation analysis in this case, properly adjusted to reflect current rates.

SBC explains that computing the total overhead recovery that the LEC receives from its end user services begins with the LEC's actual economic costs (either TELRIC or LRSIC). Using imputed costs (rates) as suggested by the IPTA, rather than the actual economic (LRSIC) costs of the service, ignores the overheads that are being recovered within the imputed costs. SBC states that its position is consistent with the FCC's orders on this subject.

2. SBC Opposes UNE Overhead Allocations

SBC opposes the IPTA's proposal to require that the overhead allocations in IPP rates be set at UNE levels, for several reasons.

First, SBC observes that the FCC has repeatedly confirmed that IPP services need not be made available

at wholesale rates to independent IPPs that are not telecommunications carriers."

Second, SBC asserts that the IPTA's analogy to UNE rates is flawed from operational and cost perspectives. The services SBC provides to IPPs are provisioned, maintained, administered, and billed like retail business services. As a result, an IPP looks like an end user, not a CLEC, from a cost perspective. As a result, retail (or retail-like) rates are more appropriate than UNE (or UNE-like) rates.

Third, SBC argues, the IPTA's position is inconsistent with the basic philosophy of the NST, which is that the upper bound of the test must be flexible enough to assure fully compensatory rates. To achieve that goal, the FCC "adopted a flexible cost-based upper bound that permitted both non-uniform overhead loadings and risk premiums when they could be justified." *Part 69 Second Reconsideration Order*, at ¶ 19.

Fourth, SBC contends that the IPTA's position represents bad competitive policy. If SBC were required to serve IPPs at UNE-type rates, CLECs would be buying UNEs or resale service at rates that are comparable to the prices SBC would charge directly to the IPPs, leaving little or no margin with which the CLECs could compete.

Fifth, SBC asserts that the IPTA's position is inconsistent with the Commission's Payphone Rules. Section 771.600 of the Commission's Payphone Rules provides that prices for services to IPPs "shall be set

according to" the FCC's NST guidelines "in effect on October 1, 1999." 83 Ill. Admin. Code § 771.600. The *CCB Opinion* was not issued until March 2, 2000, and the *Payphone Clarification Order* was not issued until January 31, 2002. Until those orders, the FCC had never suggested that the NST permitted the application of UNE overhead allocations to any service, let alone IPP services.

3. SBC argues that Intra Lata/MSA Service is not Subject to the NST

SBC no longer argues that local usage is not subject to the NST. However, it contends that the IPTA also seeks to apply the NST to Band C usage, also known as intraLATA or intraMSA toll. SBC argues that Band C usage is not "local usage" within the meaning of the *Payphone Clarification Order*.

SBC's' Band C usage is "toll," rather than "local usage." Band C usage consists of calls within a LATA or MSA, covering a distance of more than 15 miles between wire centers. These calls have been provided by long-distance carriers in direct competition with local telephone companies, on an equal access basis, since April 7, 1996. Like long-distance calls, Band C calls can be "presubscribed" by the customer to either local or long-distance carriers, pursuant to specific rules that are not applicable to local (Bands A and B) usage. 83 Ill. Admin. Code Part 773. As a result, the Commission has uniformly treated Bands A and B usage as local. However, the Commission has uniformly treated Band C usage as toll—that is, not a

form of local service. Order, Ill. C.C. Dkt. 96-NA-002, (Aug. 7, 1996)

SBC contends that treating Band C usage as toll, rather than local usage, is fully consistent with the language and intent of the *Payphone Clarification Order*. In that order, the FCC repeatedly referred to "local usage" or "local calls" as being subject to the NST. *Payphone Clarification Order* at ¶¶ 63-64. Local usage is widely recognized as a separate and distinct service from toll. If the FCC meant to include toll within the scope of the NST, it surely would have said so explicitly. Moreover, the whole purpose of applying the NST is to limit the prices that LECs could charge to IPPs for those services that the IPPs must rely upon the LECs to provide. Therefore, the Commission should make clear that Band C usage, or toll, is not subject to the NST.

B. Application of the NST to Verizon

1. Verizon Contends Its Rates Are Justified

Verizon states that its direct costs are based on LRSIC studies, which are forward looking cost studies, in accordance with Part 791 of the Commission's regulations. Verizon developed direct costs by taking the investment and applying annual charge factors ("ACFs") to develop LRSIC. An ACF is a percentage calculated by taking annual expenses for a given expense account and dividing by the average plant balance for the year. Verizon explains that, for example, ACFs such as depreciation, return, income

taxes, plant specific (maintenance/repair), and direct administration (composed of customer operations and property taxes) were applied to investment. In doing a forward-looking cost study for each payphone service, Verizon developed its forward-looking direct costs.

Verizon explains that ACFs are consistent year to year with little variation and accurately reflect the costs to Verizon of doing business. Therefore, Verizon states that ACFs are reflective of forward-looking factors. In addition, Verizon states that if an aberration occurred during a particular year, for example, a flood that causes maintenance and repair to triple, Verizon would not use the abnormally higher rate because Verizon would not anticipate the same level of activity on a going forward basis. Verizon also explains that the methodology of using ACFs to derive direct costs has been approved by the Commission and the FCC on numerous occasions. In fact, Verizon used the methodology to develop its direct costs in its 1993/1994 Illinois rate case, Docket No. 93-0301/94-0041, *consol*, so the Commission has reviewed and approved the use of ACFs to develop LRSIC rates. (*Id.*, p. 2). The FCC also approved Verizon's Selective Class of Call Screening rate element using the same ACFs. (*Id.*)

Verizon objects to the IPTA's assertion that Verizon's LRSIC studies are unacceptable in this proceeding because the Commission has not approved LRSIC studies across-the-board for Verizon in a different proceeding. Verizon argues that the IPTA's objection to utilizing this proceeding as the forum to review Verizon's LRSIC studies for payphone services

rates is untimely. Furthermore it asserts that the IPTA's objection to examining Verizon's direct cost studies for payphone services rates in this proceeding should be dismissed based on the doctrine of *laches*.

Verizon also states that the IPTA's recommended alternatives are inappropriate. First, Verizon notes that the Commission cannot require Verizon to provide service free of charge even on an interim basis. Verizon also points out that a foundation does not exist upon which the Commission could rely to adopt the direct cost studies Staff prepared in Docket No. 96-0503 as the basis for Verizon's rates in this proceeding. The direct cost studies that Staff prepared in Docket No. 96-0503 have not been submitted into the record in this proceeding, or reviewed and evaluated by the parties in this proceeding. Staff's direct cost studies were not fully reviewed or approved by the Commission in Docket No. 96-0503, either, because the Commission dismissed that proceeding.

Verizon argues that the Commission should not reject Verizon's overhead allocations simply because Verizon utilized Uniform System of Accounts ("USOA") data instead of Automated Reporting Management Information Systems ("ARMIS") data as the input in Verizon's calculations. Verizon argues that the Commission does not need to apply the FCC's endorsed methodology in the exact manner as the FCC when assessing Verizon's compliance with the NST because the Commission does not have a legal obligation to apply the NST to Verizon in the first instance. Verizon also states that the FCC's own

endorsement of more than one methodology as reasonable for the derivation of overhead allocations demonstrates that the FCC intended State commissions to have flexibility in their applications of the NST. The FCC's precedent of applying the NST as well as statements in the *Payphone Clarification Order* indicate that the FCC intended deviations from its methodologies to be permitted as long as any deviations are justified and reasonable.

Verizon submitted its filings in this proceeding several years prior to the FCC's issuance of the *Payphone Clarification Order* in 2002, and conducted its analysis consistent with the FCC precedent that existed at that time. Verizon could not have possibly foreseen the detail of the FCC's subsequently released order. Verizon states that the Commission should consider whether requiring strict compliance with any particular aspect of the FCC's subsequently endorsed methodology would produce benefits that do not exist in the manner in which Verizon employed the methodology.

Verizon submits that it would not be equitable for the Commission to reject Verizon's overhead allocations simply because Verizon utilized USOA instead of ARMIS data. Again, Verizon points out that both the Commission and the FCC have previously approved Verizon's overhead allocations derived from USOA data so Verizon could not have foreseen that USOA would be deemed unsatisfactory for some reason at the time Verizon submitted its filings in this proceeding. Verizon states that Staff's and the IPTA's

objection to Verizon use of USOA data is contrary to Commission precedent.

Verizon argues that USOA data satisfies the same measures of reliability as ARMIS data. Like ARMIS data, USOA data is routinely relied upon for regulatory purposes. The Commission requires carriers to maintain their books and accounts in accordance with USOA. (83 Ill. Admin. Code Part 710).

Moreover, Verizon submits that the Commission should not be concerned with any questions of public availability of USOA data for purposes of approving overheads based on USOA data in this proceeding. Carriers file annual reports based on USOA data with the Commission, which reports are public unless the Commission decides otherwise. (220 ILCS 5/5-109). Verizon also notes that the Commission and its Staff have access to and the ability to request carriers' USOA data at any time. Verizon states that any objection to an alleged lack of public availability of USOA data should be dismissed as a red herring because the Commission's discovery processes have provided the means for all parties to review Verizon's USOA data for the purposes of evaluating the derivation of Verizon's overhead allocations in this proceeding.

Importantly, Verizon also notes that it is important to note that USOA data is the basis for ARMIS reports, so the underlying data is identical. Verizon also explains that USOA data is, in fact, better suited to the development of overhead allocations than ARMIS data. ARMIS reports aggregate data at such a high level that some reports contain both direct and

overhead costs. Verizon notes that in the *ONA Tariff Order* the FCC dealt with this problem by assuming that all costs in reports that contain both direct and overhead costs are overhead costs. Accordingly, Verizon submits that strictly following the methodology employed by the FCC in the *ONA Tariff Order*, which used ARMIS data, would produce less appropriate overheads than Verizon's employed methodology, which used USOA data, because the use of ARMIS data may cause overhead allocations to be slightly overstated.

Accordingly, it is Verizon's position that the Commission should accept Verizon's submitted overhead allocations based on USOA data. Verizon states that it would be inequitable for the Commission to reject Verizon's overhead allocations simply because Verizon used USOA rather than ARMIS data. Verizon also states that such an immaterial variation from the exact methodology employed by the FCC in its *ONA Tariff Order* would not be a reasonable basis to dismiss Verizon's analysis, which forms the foundation of the evidentiary record in this proceeding, especially when the alternative, i.e., the employment of ARMIS data, would have produced slightly overstated overhead allocations. Accordingly, it is Verizon's position that no reasonable basis has been advanced to reject Verizon's overhead allocations. Verizon requests that the Commission accept Verizon's overhead allocations based on Verizon's submitted analysis in this proceeding.

2. Verizon's Response to Staff's Alternative Proposal

Verizon states that Staff's proposal to derive new rates for Verizon's payphone services based on a uniform overhead allocation equal to SBC's UNE overhead markup is not reasonable. Verizon contends that it is not appropriate to apply an overhead allocation factor derived for one carrier to another carrier because carriers' overheads are a derivative of carrier-specific costs and c st structures. Verizon further explains that because of geographic and demographic differences between SBC's and Verizon's markets, SBC will have better purchasing power that also affect cost structure comparisons. The evidentiary record contains no foundation upon which to assess how application of SBC's UNE overhead markup to Verizon's direct cost studies would impact Verizon's cost recovery. Therefore, Verizon submits that the Commission would be engaging in arbitrary and capricious action should the Commission adopt Staff's alternative proposal.

Verizon notes that Staff's reliance on the FCC's acceptance of a similar overhead allocation factor in the FCC's *Physical Collocation Order* does not alleviate the underlying infirmities in Staff's alternative proposal. The overhead allocation factor adopted in the FCC's *Physical Collocation f Order* was for a different service and a different carrier. There is no evidentiary foundation in this proceeding from which the Commission could assess whether the overhead would also be appropriate for Verizon's payphone services rates. Accordingly, Verizon submits that the

Commission's adoption of Staff's alternative proposal would constitute arbitrary and capricious action despite the FCC's endorsement of a similar overhead allocation factor in a different proceeding.

3. Verizon Contends Its Recovery of the End User Common Line Charge is Appropriate

Staff and the IPTA take the position that Verizon should not be able to recover a End User Common Line Charge ("EUCL") in addition to payphone line rates from IPPs. The FCC's direction on this issue is again cited as the basis for the position. (*Payphone Clarification Order* at ¶60). The FCC also noted that forward-looking cost studies, such as LRSICs, are usually calculations of total costs. (*Id.*) Accordingly, the FCC stated that "if an incumbent BOC files in its state tariff a charge that fully recovers these unseparated costs and also assess on the Payphone Service Provider ("PSP") its federally tariffed SLC, the BOC will over-recover its costs..." (*Id.*) Verizon argues that the FCC's conclusions do not apply to Verizon, and should not be followed by the Commission.

Verizon did not file payphone line rates that "fully recover costs." While forward-looking cost studies cover total costs, Verizon's payphone line rates are set below LRSIC. Verizon's only payphone line rate that does not, on its face, demonstrate that it is set below LRSIC is the Flat Coin -Coin Operated Pay Telephone ("COPT") rate. However, according to Verizon, once usage is properly adjusted, it is clear that

Verizon's Flat Coin - COPT rate is also set below LRSIC.

The fact that Verizon's payphone line rates are set below LRSIC creates a clear distinction from the FCC's described scenario in the *Payphone Clarification Order*. The FCC recognized that double recovery would only occur *if* a carrier filed rates that *fully recover costs*. (*Payphone Clarification Order* at ¶60). The fact that Verizon did not file rates that fully recover costs means that the FCC's statement does not apply to Verizon's payphone line rates. Verizon urges the Commission not to adopt Staff's and the IPTA's recommendation to follow the FCC's direction in this instance.

Verizon points out that the price for any one service is necessarily a function of the prices established for other services. Verizon's payphone line rates have traditionally been set lower in recognition of the EUCL's role in recovering costs. This is a pricing and cost recovery structure that the Commission has previously approved. Verizon developed its payphone line rates below LRSIC in this proceeding because of the Commission's historical treatment of the EUCL. The Commission should recognize historically approved cost recovery structures in evaluating the appropriateness of carriers assessing particular rate structures. As rate components are dependent on each other for full cost recovery, it would be necessary to restructure Verizon's payphone line rates should the EUCL, one means of line cost recovery, not be assessed in the future.

Verizon asserts that carriers have historically recovered a portion of line rates through the assessment of the EUCL to *all end users* -- not just IPPs. Business customers pay the same EUCL rate as IPPs, consistent with the Commission's policy that all users of services using the same underlying facilities and instruments be priced the same. Verizon urges the Commission not to deviate from this policy by eliminating the assessment of the EUCL for IPPs in this proceeding.

4. Verizon Argues Its Recovery of the PICC is Appropriate.

Staff and the IPTA propose that the Commission prohibit Verizon from recovering PICC charges in addition to payphone services rates. Verizon contends that while both parties advance this proposal, however, neither cites any reasonable basis for adopting it. The Commission should not adopt Staff's and the IPTA's recommended treatment of the PICC charge, for the same reasons discussed *supra* with respect to usage and EUCL charges.

The FCC noted in the *Payphone Clarification Order* that the purpose of the PICC is to recover costs that would otherwise remain unrecovered because of federally imposed caps on line rates. Therefore, in the *Payphone Clarification Order*, the FCC rejected the exact proposals advanced by the IPTA and Staff in this proceeding, as follows:

> The multiline business PICC ... does not recover the costs of the lines on which it

> is assessed. Rather, it recovers costs that would be unrecovered through charges on residential and single line business lines, if those charges were not capped. It is a temporary subsidy element that is being phased out of the interstate access charge system. PICC revenues should not, therefore, be subtracted in determining a forward-looking cost-based rate for payphone lines.
>
> *Payphone Clarification Order* at ¶60.

Verizon argues that preventing its collection of PICC charges in addition to its payphone line rates would clearly result in Verizon's under recovery of costs. The Commission should not take any action pertaining to the PICC in isolation in this proceeding. The Commission should find in accordance with the FCC that it is appropriate for carriers to recover the PICC in addition to payphone line rates.

C. IPTA's Position

1. Rates Must Be Consistent With the NST

The IPTA believes that both SBC and Verizon have failed to meet their burden of proving that the tariffed rates for payphone access services are in compliance with the NST. The IPTA urges the Commission to reject the tariffed rates in their entirety and adopt the IPTA's proposed adjustments in order to ensure payphone access rates that are: 1) cost based; 2)

in compliance with the NST and the Commission's own regulations; and 3) free from discrimination in favor of the LEC's own payphone operations as required by the NST.

The IPTA argues that the NST mandates that payphone access rates be set according the direct cost of that service, plus a just and reasonable overhead allocation. (citing 47 C.F.R. § 61.49(g)(2)). The IPTA argues that the direct cost for a payphone access service must be based on forward-looking cost methodology. IPTA witness Starkey provides a review of past FCC orders wherein the FCC has repeatedly held that consistent, forward looking incremental costs are the proper standard to be used in developing direct costs consistent with the NST. In Illinois, such costs are generally constructed using the Commission's LRSIC standard as described in Part 791 of the Commission's rules.

Added to the direct (LRSIC) cost of the payphone services would be an amount to recover a portion of the LEC's common and shared costs (overhead). The FCC has mandated that the LEC must justify the level of overhead costs it proposes to add to the direct cost of a service or feature. IPTA argues that the NST has no meaning, nor any benefit to facilitating competition, unless both reasonable direct costs are estimated, and, some reasonable restraint is placed on the ILEC's ability to add an overhead allocation to those direct costs for purposes of setting reasonable, cost-based rates.

IPTA contends that the *Payphone Clarification Order* clearly reiterates that state commissions may use the UNE overhead when reviewing the LEC's rates for compliance with the NST. The IPTA notes also that applying the overhead allocations for UNEs would be particularly appropriate for payphone services. Using the previously-approved cost studies in Docket 96-0486 would, says the IPTA, accomplish that goal. The IPTA asserts that using the UNE overhead allocation as the "comparable" overhead allocation to be used in setting the prices under the NST is wholly consistent with the recognition of IPPs as telecommunications carriers.

The IPTA says that the *Payphone Clarification Order* clearly dictates that SBC's and Verizon's usage sensitive rate elements must be subject to the NST. Any rate for local usage billed to a payphone line, as well as the monthly payphone line rate, must be cost-based and priced in accordance with the NST. This requirement applies regardless of whether current payphone line service tariffs specify a particular rate for payphone line usage, or whether they currently incorporate by reference the applicable rate from a business service tariff.

2. EUCL Charges Are Redundant

According to the IPTA, the final element for the Commission to determine in identifying the price calculated under the NST is whether to attribute the revenues associated with the EUCL against the costs of providing the services. SBC assesses the IPPs an additional EUCL charge of $5.40. Verizon assesses the IPPs in its service territory an additional EUCL charge

of $8.85. The members of the IPTA have been paying the additional EUCL charge since before April 15, 1997.

The IPTA contends that if a rate for a payphone access line is established that recovers 100% of the LRSIC and then an additional EUCL charge is included which is aimed at recovering the same costs again, then any resulting price would double-recover costs associated with that service. The IPTA argues that the FCC in the Payphone Clarification case stated that the LEC must reduce the monthly per-line charge to account for the EUCL:[14]

Under the NST, the BOC may not charge more for payphone line service than is necessary to recover from PSPs all monthly recurring direct and overhead costs incurred by BOCs in providing payphone lines. The forward-looking cost studies used to make these determinations are usually calculations of total costs, not jurisdictionally separated costs. If an incumbent BOC files in its state tariff a charge that fully recovers these unseparated costs and also assesses on the PSP its federally tariffed SLC, the BOC will over-recover its costs, and the PSP will over-pay, in violation of the NST and the cost-based rates requirement of the *Payphone Orders*.

The IPTA also notes that Verizon agrees that the revenue derived from the EUCL should be included to determine whether the network services made available to IPPs complies with the NST. Verizon Ex. 10, p. 7.

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[14] In this proceeding, the parties agree that the EUCL and the Subscriber Line Charge ("SLC") are the same thing. Tr. 984.

3. No-PICC Charges Should Be Deducted From Rates

In addition to the rates for payphone access services and the EUCL, Verizon assesses the IPPs an additional charge resulting from PICC. The PICC is another FCC prescribed charge that is intended to recover a portion of the non-traffic sensitive costs incurred by LECs in providing services to access line subscribers. IPTA Ex. 6 at 30.

SBC does not assess a PICC, but Verizon assesses a PICC of $4.81. Thus, if an IPP chooses a pre-subscribed interexchange carrier, Verizon will assess the PICC to that interexchange carrier. The IPTA notes, however, that IPPs have very few 1+ interLATA calls per month so that the interexchange carrier will almost uniformly pass the PICC charge to the PSP. The IPTA acknowledges that the *Payphone Clarification Order* holds that the NST does not require the LEC to account for these charges when assessing its monthly access charges in these circumstances. *Payphone Clarification Order* ¶ 60.

The IPTA argues that the same logic does not govern the circumstances wherein an IPP does not choose an interexchange carrier - the no-PICC charge. In that circumstance, Verizon will assess to the IPP directly a no-PICC charge (as compared to assessing the PICC to the interexchange carrier). Verizon's no-PICC of $4.81 rate is the same as its PICC rate. IPPs will often no-PICC their access lines in order to minimize fraudulent calls being made over the LEC's network. IPTA argues that because the no-PICC rate is

a tariffed rate imposed on IPPs to prevent fraudulent calls being completed over Verizon's network, it is a charge that should be accounted for under the NST and should be subtracted from the monthly access charges assessed the IPP.

IPTA witness Starkey provided this Commission with a formula which he asserts should be used to determine Verizon's and SBC's payphone access rates. Under the NST, the price of the local exchange service, for example, would be expressed as the following formula:

Direct	**Overhead**	**Reasonable**
Cost	**Cost**	**Rate**
LRSIC +	LRSIC x Overhead %	- EUCL - No-PICC = Rate

The IPTA believes that only by applying this formula can the Commission assure that network services made available to payphone providers are cost-based, and comply with the NST.

The IPTA disagrees with SBC's argument that the Commission is prohibited from adopting rates that comply with the NST in this proceeding because of the settlement agreement in Docket 88-0412. The IPTA also notes that the adoption of the Order in Docket 88-0412 took place in 1995, prior to the adoption of the T96. Section 276 specifically preempts any state action inconsistent with the NST. Therefore, the terms of the Section 276 supercede the terms of the Order in Docket

88-0412. The IPTA also notes that the Order in Docket 88-0412 specifically authorizes the adjustment of rates subject to the Order.

D. Staff's Position on the Application of the NST

Staff asserts that both SBC Illinois and Verizon must make adjustments to the rates each company charges IPPs in order to satisfy the NST. In each case, the rate that the ILEC charges the IPP should equal the LRSIC of the service plus a reasonable markup for overhead (shared and common) costs. Staff testified that a reasonable markup would be similar to the rate that the Commission has authorized SBC to assess in its UNE tariffs. In addition, because LRSIC includes the interstate costs as well as intrastate costs, the total charge to the IPP customer should include the End User Common Line Charge ("EUCL") and the PICC, if one is imposed by the local exchange carrier and has not been separately identified on the bill to the IPP. Staff contends that no party in this case has provided the necessary cost data to determine appropriate rates based on this scenario. Morevoer, no LEC has made an acceptable recommendation for a reasonable allocation of overheads. In the absence of this information Staff recommends that both SBC and Verizon be ordered to file new tariffs, using the shared and common cost allocation that is used by SBC for its UNE rates.

1. Staff Argues SBC Has Not Satisfied The NST

Staff notes that SBC has included tariffs for COPTS, Coin Access Line, Basic Coin Line, Answer Supervision, Restricted Coin Access and ProfitMaster in this proceeding. Staff argues that prior Commission approval of tariffs for these services does not automatically satisfy the NST, because the NST is more stringent than the Commission's LRSIC test. To satisfy the LRSIC test (which establishes a price floor) a company only need demonstrate that its rate is equal to or higher than the LRSIC. The NST additionally requires the markup over LRSIC to be "reasonable."

SBC included updated studies in this proceeding and argues that its markups for payphone service LRSIC costs are reasonable. Staff cautions that the costs used in this computation should remain LRSIC based rather than the TELRIC methodology charged to CLECs because IPPs are end-user customers, rather than telecommunications carriers.

The FCC found, in the *Payphone Clarification Order*, that the NST properly applies to usage sensitive as well as flat-rate elements of the services offered to PSPs. Further, the FCC stated that a high usage rate would undermine efforts to set the payphone service rates in accordance with a cost-based standard. A non-cost-based usage rate would also constitute an impermissible "end run" around the requirements of Section 276.

In those situations where usage is separate from the other payphone services, usage need not pass the NST on a stand-alone basis. On the other hand, Staff insists usage rates have been included in tariffs for all companies providing service in Illinois for a long time, and rates charged are comparable between companies and should be required to pass the NST. Staff argues that ILECs charge IPPs a per-minute rate for every minute of usage, rather than the fixed rate for the first three minutes followed by a per-minute rate for each minute after three minutes that IPPs typically charge their customers. Staff contends that current usage markups, normally well over the 100% range, are unreasonable.

"Operator Services" revenues are also essential to the provision of payphone service, and should be a part of the NST and imputation testing. Staff quotes from the FCC's *Payphone Clarification Order* approving markups from the UNE proceeding This rate appears to the Staff to be a reasonable markup over LRSIC for payphone rates, within the meaning of the *Payphone Clarification Order*. Staff Exhibit 2.1 at 5, Staff Ex. 2.3 at 12, Staff Ex. 2.4 at 10.

Staff also agrees with the IPTA that total charges to payphone providers for the network access line should be inclusive of and PICC. Staff requests that the Commission note that EUCL is intended to recover the interstate portion of the non-traffic sensitive costs associated with the network access line, and therefore the calculation will apply only to the price of the access line, i.e., Basic Payphone Service or COPTS line.

According to Staff's analysis SBC does not pass the FCC's NST for all payphone services. Staff Ex. 2.0 at 23. Staff contends that to pass the NST, SBC must lower its markups to a level no greater than the percentage over LRSIC previously approved by the Commission for SBC's UNE tariffs.

2. Staff Contends Verizon's Overhead Markups Are Derived from an Unapproved Methodology

Staff notes that Verizon's data shows that its payphone rates do not recover more than its direct costs (LRSIC) plus a reasonable portion of its overhead costs. As a result of the Order, Verizon used a new methodology for determining the overhead loading factor for payphone services. However, Staff contends that the methodology used by Verizon in determining these new markups is flawed, as it does not comply with the guidelines specified in the *Payphone Clarification Order*.

Verizon attempted to develop new overhead markups using inputs to ARMIS data rather than ARMIS data itself, as contemplated by the FCC's *ONA Order*. Verizon's methodology is not, therefore, one of the methodologies that the FCC specified as proper in the *Payphone Clarification Order*. Accordingly, Staff recommends that the Commission reject Verizon's methodology as a means to establish overhead loadings. Instead, Staff continues to recommend that UNE markups be utilized.

Staff recommends that the Commission direct Verizon to use a markup consistent with the lower end markup authorized by the *Physical Collocation Order* as it applies to Verizon. Staff Ex. 2.4 at 9-10. This would result in an overhead loading factor of 1.35.

3. Staff Argues SBC's Markups Also Use An Unapproved Methodology

Staff finds fault with SBC for similar reasons. SBC developed its proposed new overhead markups using its own, unique interpretation of the FCC's *Physical Collocation Order*. SBC's proposal likewise is not consistent with the methodologies that the FCC has determined to be proper, and should also be rejected.

Staff contends that SBC's analysis is defective in a number of ways. First SBC's overhead loadings are artificially inflated. SBC multiplied 1998 call volume by the *rate* charged in 2001, which exceeded that of 1998 (50¢, as opposed to 35¢). *See* SBC Ex. 4.3, Schedule KAC-1; *see also* IPTA Ex. 9.0 at 4.

Second, the FCC *Physical Collocation Order* requires a rate-by-rate analysis, *see* Physical Collocation Order, ¶¶308, 313, but SBC's analysis is based on an average of all overhead amounts for comparable services. Therefore, the SBC analysis does not comply with the *Payphone Clarification Order*.

Third, the FCC required that when a carrier uses the "comparable services method" like that described in the *Physical Collocation Order*, the maximum

overhead loading for a rate should equal the *lowest* overhead amount from the list of comparable services. Physical Collocation Order, ¶¶308, 313. Staff points out that SBC, does not utilize this method; instead it improperly uses an average.

Fourth, the average markup analysis used by SBC skews the overhead allocation upward because SBC's local usage rate has a very high markup that results in a higher average markup. Accordingly, SBC's methodology results in excessive markups.

Therefore, Staff argues SBC's methodology should be rejected because it neither complies with any one of the three methodologies established in the Payphone Clarification Order, nor results in reasonable markups for overhead. The Staff recommends that the Commission impose the markup - already reviewed and approved by the Commission - which SBC applies to UNEs.

Staff agrees with the rate formula proposed by the IPTA, noting that when determining a usage rate EUCL and non-PICC rates should be shown as zero in the formula.

E. Commission Analysis and Conclusion

1. Direct Costs Methodology.

When reviewing tariffed rates for compliance with the NST, state regulators may use either the FCC's TELRIC methodology (47 C.F.R. § 51.505) or the state's own forward-looking cost methodology. In Illinois,

such forward-looking, direct costs are generally constructed using the Commission's LRSIC standard as described in Part 791 of the Commission's rules. Under Part 791, LECs are required to provide cost studies based upon forward-looking costs.

Part 791.20 reads, in pertinent part:

(a) The long-run service incremental cost of a service ("LRSIC") is the forward-looking additional cost(s) incurred by the telecommunications carrier ("carrier") to provide the entire output of a service, including additional resources such as labor, plant, and equipment. Long-run service incremental cost excludes any costs, including common costs, that would be incurred if the service is not produced.

b) Long-run costs are the economic costs over a planning horizon long enough so that there are no sunk inputs or costs.

c) Forward-looking costs are the costs to be incurred by a carrier in the provision of a service. These costs shall be calculated as if the service were being provided for the first time and shall reflect planned adjustments in the firm's

> plant and equipment. Forward-looking costs ignore embedded or historical costs; rather, they are based on the least cost technology currently available whose cost can be reasonably estimated based on available data.

We will use the Part 791 LRSIC Cost of Service Rules to determine whether the LECs have appropriately used the forward-looking direct costs in calculating their payphone access rates. By applying the Part 791 Rules, the Commission can be assured that it has appropriately applied the forward-looking cost methodology to determine compliance with the NST.

2. Overhead Allocation Methodology

The FCC has mandated that under the NST, an LEC must justify the level of overhead costs it proposes to add to the direct cost of a service or feature. *See, Payphone Clarification Order* ¶ 52; *citing, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture,* FCC Docket No. 89-79, 6 FCC Rcd 4524, 4531 (1991) at ¶ 44.

The record does not support a finding that SBC and Verizon have met their burden with respect to this issue. Neither of their suggested overhead loading methodologies comport with FCC-prescribed methods.

SBC suggests that its existing rates are in compliance with the NST. In the alternative, it has suggested overhead allocations which it says are consistent with the *Physical Collocation Tariff Order*. The total overheads recovered through SBC Illinois' end-user payphone services include two components: (1) the allocations included in the imputed prices of tariffed services such as access lines and usage, and (2) the additional "profits" of the end-user payphone service itself. SBC's Dr. Currie determined the overall "margin" or overhead allocation attributable to SBC Illinois payphone operations by using the direct (LRSIC) costs of all of the inputs into those operations and comparing them to the revenues presented in the imputation analysis in this case, properly adjusted to reflect current rates.

The Commission rejects SBC's methodology because it fails to comport with the Physical Collocation Order or any of the other permitted overhead methodologies. Specifically, SBC uses an average markup analysis rather than the lowest markup from the list of comparable services. SBC's approach results in excessive overhead markups and fails to comply with the *Payphone Clarification Order*.

The Commission finds that Verizon's proposed overhead allocations are inconsistent with the FCC's NST. Verizon's methodology used USOA data instead of ARMIS data and is based on historical rather than forward looking data. Verizon has failed to meet its burden of proof with respect to overhead allocation factors.

We believe that the use of the LEC's comparable UNE overhead factor as recommended by Staff and the IPTA is appropriate. The FCC was explicit when it held that "UNE overhead loadings may be used in this manner, and states that have used this methodology are in full compliance with section 276 and our *Payphone Orders.*" *Payphone Clarification Order* ¶ 52. We therefore find that use of the overhead loading factor recommended on page 33 of Staff's Initial Brief on Reopening is appropriate for payphone access services in Illinois.

3. Usage Sensitive Services and Other Issues

We also find that both SBC and Verizon are required to apply the NST to their usage sensitive services. The FCC held that "any rate for local usage billed to a payphone line, as well as the monthly payphone line rate, must be cost-based and priced in accordance with the NST." *Payphone Clarification Order* ¶ 64. Both SBC and Verizon have failed to meet their burden with respect to usage sensitive services. We agree however, with SBC that IntraLata or Intra MSA service is competitive and not subject to the NST.

The next issue is whether SBC and Verizon have properly accounted for the revenues associated with the EUCL in the cost studies submitted herein. The EUCL is federally prescribed charge intended to recover costs associated with outside plant and loop facilities. A properly calculated LRSIC, however, already recovers 100% of those costs. If a rate for a payphone access line is established that recovers 100%

of the LRSIC, and then an additional EUCL charge is included, then any resulting price would double-recover costs associated with that service.

Under the NST, in establishing its cost-based, state-tariffed charge for payphone line service, the LEC "must reduce the monthly per line charge determined under the NST by the amount of the applicable federally tariffed [EUCL]." *Payphone Clarification Order* ¶ 61. Thus, we find that the NST and our Part 771.600 require the LECs to reduce the monthly charge assessed the IPPs by an amount equal to the EUCL. If we were to hold otherwise, SBC and Verizon would be allowed to double-recover the costs associated with the loop portion of the network.

4. No-PICC charge assessed directly from LEC to IPP.

In addition to the rates for payphone access services and the EUCL, Verizon assesses the IPPs an additional charge resulting from the PICC. The record indicates that Verizon assesses the IPP the same $4.81 PICC charge when the IPP does not presubscribe an interexchange carrier, the so called no-PICC. The no-PICC rate is a tariffed rate imposed on IPPs to prevent fraudulent calls being completed over Verizon's network. As such, it is a charge that should be accounted for under the NST and should be subtracted from the monthly access charges assessed the IPP in the situation where the IPP does not choose an interexchange carrier.

The Commission finds that Verizon's treatment of PICC charges and E-911 surcharges is appropriate. The IPTA incorrectly assumes that the imputation test should include a charge for all customers for these two items. In the case of the PICC, only lines that are not pre-subscribed would require a charge. Otherwise, the PICC is charged to the pre-subscribed IXC and should not be reflected in the imputation analysis. Whether or not an IXC passes through its PICC to the payphone provider is a non-issue. What matters is that the payphone provider is not confronted by the ILEC with this charge when pre-subscribed.

The Commission finds persuasive Verizon's argument that E-911 surcharges are merely passed between its semi-public payphone customers and the 911 systems. A competitive provider of semi-public payphone service would also merely collect and remit the surcharge. As such, the ILEC faces no costs for E-911 services when providing semi-public payphones and the imputation test should reflect this.

We adopt the formula proposed by the IPTA and supported by Staff for determining a reasonable rate based upon LRSIC. We agree with Staff that when determining a usage rate, EUCL and non-PICC rates should be shown as "zero" in the formula.

Direct	**Overhead**	**Reasonable**
Cost	**Cost**	**Rate**
LRSIC +	LRSIC x	

Overhead - EUCL - No-PICC = Rate %

V. IPTA's Request for Refunds

A. IPTA's Position

The IPTA argues that under the FCC's *Payphone Orders*, SBC and Verizon were required to have implemented, by April 15, 1997, tariffs setting forth rates that complied with the NST. Under the FCC's *Payphone Reclassification Orders*, to the extent that a tariffed rate is reduced after a state investigation implementing the NST, LECs are required to reimburse or provide credit to its customers for these payphone services from April 15, 1997 to the date of implementation:

> Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of

> the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. *A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.* This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.
>
> *Limited Waiver Order*¶¶. 1-2

The IPTA requests that the Commission, to the extent it reduces the rates charged by SBC and Verizon for network services, order these LECs to reimburse or provide credits for the difference between what has been charged, and the cost-based rate adopted by the Commission. The IPTA argues that IPPs are entitled to receive refunds or credits for those unlawful charges imposed during the period from April 15, 1997 to the date that the new tariffed rates are implemented. The IPTA contends that this FCC decision mandates that the Commission should order that Verizon and SBC identify and calculate the amount of refunds due and owing to the IPPs based on the revised tariffed rates.

B. SBC's Response

SBC argues that this proposal is unlawful, inequitable, and contrary to both state and federal law. SBC cites *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932); and *Independent Voters of Illinois v. Commerce Comm'n*, 117 Ill. 2d 90 (1987); *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205 (1954).

In *Arizona Grocery*, the Interstate Commerce Commission had reviewed a railroad's rates and set a maximum allowable rate for a certain route. Later, in another proceeding, the Interstate Commerce Commission set a lower rate and ordered reparations for payments that exceeded the new rate. The Supreme Court rejected the reparation award. The Court ruled that, when the Interstate Commerce Commission set the railroad's maximum rate, any rate within the maximum "became by virtue of the Commission's order also a lawful—that is, a reasonable—rate." *Arizona Grocery*, 284 U.S. at 387. The Court made clear that this remained true until the Interstate Commerce Commission entered an order setting a lower rate. "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." Id. at 389.

Similarly, the Illinois Supreme Court has held that a Commission-approved rate "cannot be held to be excessive," because such a ruling would be directly contrary to the statutory requirement that a carrier charge only its lawfully tariffed rates. *Independent Voters*, 117 Ill. 2d at 97; *accord Mandel Bros.*, 2 Ill. 2d at 209.

SBC argues that the Commission has approved its IPP rates equivalent to retail business rates at least twice. First, in Dockets 84-0464 and 84-0442 (consolidated), SBC proposed IPP rates based on comparable retail services. SBC points out that none of the parties, including the IPTA, objected to those rates. Then in Docket 88-0412, SBC, the IPTA and the Commission itself all agreed that IPP rates would remain equivalent to retail business rates (with the exception of the discounted usage rate schedule), as discussed in the *1995 Payphone Order* (at 18, 23-26). The terms of that order have governed SBC's IPP rates since 1995, and, under the terms of that Order would continue to govern those rates through June 30, 2005.

SBC argues that the IPTA's refund claim relies largely on its reading of an order of the FCC's Common Carrier Bureau granting limited waivers of the time limit for filing intrastate tariffs for IPP rates, and making tariffs filed pursuant to the waiver subject to certain refund obligations. IPTA Br. on Reop. at 75-77, citing *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. 96-128 (April 15, 1997) (the "*Limited Waiver Order*"). SBC asserts that the IPTA argument that both SBC and Verizon acted pursuant to the waiver and are subject to the conditions contained in the FCC's orders is incorrect.

SBC contends that because its intrastate IPP rates had already been reviewed and approved by this Commission, and indeed had been agreed to by the

IPTA, SBC did not rely on the waiver to file any new IPP tariffs. Instead, it simply filed cost documentation with the Commission supporting its existing rates. (Am. Ill. Ex. 1.0, p. 25).

SBC contends that the refund obligation in the *Limited Waiver Order* addresses LECs filing new tariffs. Because the order itself states that the Bureau "grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be filed in compliance with federal guidelines." The refund obligation applied only when such newly filed rates were lower than existing rates. *Id.* at ¶¶ 20, 25.[15] Second, if the refund obligation in the *Limited Waiver Order* were applied to approved rates, that order would necessarily be contrary to the Supreme Court's holding in *Arizona Grocery*. The Common Carrier Bureau cannot overrule the Supreme Court.

SBC argues that IPTA has also misapplied a refund commitment made by the Regional Bell Operating Companies ("RBOCs"), in a letter from Michael Kellogg to the FCC. That letter was the subject of an SBC Motion to Strike. In its Motion, SBC argued that Mr. Kellogg's letter is not in the record in this proceeding, nor was any evidence of the meaning or intent of that letter. The Act requires that the IPTA's construction of the Kellogg letter be supported by

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[15] The Bureau contemplated that existing, approved and effective tariffs would remain in place. In fact, certain payphone parties argued that the Bureau should have required currently effective tariffs to be refiled with state Commissions, so that they would be freshly reviewed. However, the Bureau rejected that suggestion. Id. at ¶¶ 17, 21.

placing the letter itself, plus any relevant evidence of its meaning or intent, in the record. 220 ILCS 5/10-103. The IPTA first attempted to introduce the letter as an attachment to its Initial Post Hearing Brief and later asked the Commission to take administrative notice of it. In granting SBC's Motion to Strike, the ALJ found that the letter, submitted after the evidentiary phase of this proceeding, was not a proper subject for administrative notice under the Commission's rules. Therefore, arguments based upon the letter should not be considered in this Order.

C. Verizon's Response To The Refund Request

Verizon argues that the Commission should not impose refunds in this proceeding. Verizon asserts that because its filed rates are just and reasonable, no potential basis for the issuance of refunds exists. Verizon contends that the issuance of refunds would violate the prohibition against retroactive ratemaking. *Citizens Utilities Co. v. Illinois Commerce Comm'n.*, 124 Ill.2d 195, 206-07, 529 N.E.2d 510 (1988). Verizon points out that, in part, IPTA argues that the Commission should impose refunds on Verizon because BOCs agreed to voluntarily issue refunds in a letter to the FCC. That letter, not made part of the record in this case, should not be considered in this Order. Moreover, neither Verizon, nor Verizon's BOC affiliates that operate in jurisdictions outside Illinois, were signatories to the voluntary refund commitment to the FCC.

Verizon argues that the Commission should not rely on the decision issued by the New York court regarding Verizon's New York BOC affiliate to find otherwise. The New York court's decision is not controlling because the Commission is not bound by out-of-state court decisions. Moreover, the New York court made a poor decision.

In addition, Verizon states that it would be improper for the Commission to follow the New York court in this instance. It would be contrary to law for the Commission to hold Verizon to the regulatory bargain struck by certain BOCs and the FCC with regard to the issuance of refunds because the FCC exceeded its jurisdictional authority when it required non-BOC ILECs to file state tariffs for payphone services pursuant to the NST. (*Payphone Clarification Order*, ¶42). Any regulatory bargain to issue refunds that was struck in the face of such an improper assertion of jurisdiction cannot stand. It is Verizon's position that the Commission must reject the IPTA's proposal to require Verizon to issue refunds based on a third party carrier's voluntary commitment to do so in exchange for a limited waiver for filing tariffs that the FCC had no authority to require Verizon to file in the first instance.

Verizon argues that the IPTA has failed to identify any legal basis upon which the Commission could rely to require Verizon to issue refunds. In summary, Verizon contends that the IPTA has failed to make any showing that refunds would be appropriate even if refunds were lawful. The Commission,

according to Verizon, should reject the IPTA's request for refunds from Verizon.

D. Staff's Position

Staff categorically rejects IPTA's refund argument, citing Section 9-240 of the Act that provides, in relevant part, that:

> Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, except as provided in Section 9-104, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. 220 ILCS 5/9-240

Section 9-240 is in essence, a codification of the filed rate doctrine, under which a utility cannot lawfully charge more or less that the tariffed amount

for its services. *See, e.g., Marcus v. AT&T*, 138 F.3d 46, 58 (2nd Cir. 1998). Staff cites several federal appellate court decisions that support an expansive interpretation of the filed rate doctrine. These cases state, among other things, that: 1) the filed rate doctrine is intended to prevent common carriers and utilities from engaging in price discrimination, and also to keep courts out of the ratemaking process; 2) that customers are conclusively presumed to know the lawful rate for a service set forth in a utility's tariff; 3) that the filed rate doctrine applies even where a carrier misquotes or misrepresents rates to a customer; 4) the doctrine prevents carriers and utilities from "accidentally" misquoting rates to favored customers; 5) that the courts recognize that any presumption that modern telecommunications customers review filed tariffs "is little more than a legal myth" which does not "reflect current reality"; and 6) that courts are compelled to apply the filed rate doctrine "regardless of equitable circumstances suggesting [they should do] otherwise." Staff argues that this provision alone is fatal to the IPTA's claim that a true up, or refund should be issued to pay phone operators.

Staff asserts that the IPTA's attempts to sugar coat its request by suggesting that Staff's revised cost studies extracted from ICC Docket 96-0503 should be used as a foundation to set interim rates also fails. The rates in question are and, at all relevant times in this proceeding, have been final, tariffed, Commission-approved rates. To authorize a refund would effectively result in IPTA members paying less than the tariffed rate at the time the payphone services were actually received. Thus, such an action would violate

Section 9-240's injunction against "charg[ing], demand[ing], collect[ing] or receiv[ing] a greater or less or different compensation ... for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in [the company's] schedules on file and in effect at the time [.]" 220 ILCS 5/9-240. Accordingly, Staff asserts that the IPTA's request is unlawful and should be rejected.

E. Commission Analysis and Conclusion

Both the United States Supreme Court and the Illinois Supreme Court have ruled that rates that have been reviewed and approved by the appropriate regulatory agency cannot later be subject to refund. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932); *Independent Voters of Illinois v. Commerce Comm'n*, 117 Ill. 2d 90 (1987); *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205 (1954).

In *Arizona Grocery*, the Supreme Court ruled that, when the a regulatory agency has reviewed a rate, that rate "became by virtue of the Commission's order also a lawful—that is, a reasonable—rate." *Arizona Grocery*, 284 U.S. at 387. The Court made clear that this remained true until the Interstate Commerce Commission entered an order setting a lower rate. "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Id* at 389. Illinois law is the same. An approved rate "cannot be held to be excessive," because such a ruling would be directly contrary to the statutory requirement that a carrier charge only its

tariffed rates. *Independent Voters*, 117 Ill. 2d at 97; *accord Mandel Bros.*, 2 Ill. 2d at 209.

Here, the Commission has approved SBC's IPP rates equivalent to retail business rates at least twice. First, in Dockets 84-0464 and 84-0442 (consolidated), SBC proposed IPP rates based on comparable retail services. *See* Interim Order, Ill. C.C. Dkts. 84-0464 & 84-0442 (cons.) at App. A, p. 1. None of the parties, including the IPTA, objected to those rates. *Id.*, at 19-30. And, in Docket 88-0412, SBC, the IPTA and the Commission itself agreed that IPP rates would remain equivalent to retail business rates (with the exception of the discounted usage rate schedule), as discussed in the *1995 Payphone Order* (at 18, 23-26). The terms of that order have governed SBC's IPP rates since 1995.

Significantly, from the time that the FCC established its NST through today, there has been no complaint to formally challenge the rates at issue in this case. This lack of direct action on the part of the IPTA (a party to the 1995 settlement establishing current rates) is consistent with SBC's observations that the IPTA has benefited from the Payphone order during the eight years it has been in effect. SBC points out that the IPTA has enjoyed deep discounts on IPP usage rates and other advantages conferred by our Order incorporating the 1995 Settlement. This severely undercuts the IPTA refund argument.[16]

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[16] As Staff notes in Reply to Briefs on Exceptions on Reopening, at 20-21 "the fact that IPPs have paid, [in the IPTA's words] 'unlawful excessive rates for more than 6 years' is primarily attributable to IPTA's desultory pursuit of this case. For example, IPTA filed its direct testimony nearly six months late . .

Furthermore, the IPTA's refund claim relies largely on its reading of an order of the FCC's Common Carrier Bureau granting limited waivers of the time limit for filing intrastate tariffs for IPP rates, and making tariffs filed pursuant to the waiver subject to certain refund obligations. IPTA Br. on Reop. at 75-77, *citing the Limited Waiver Order*. According to the IPTA, "[i]t is clear in this docket that both SBC and Verizon acted pursuant to the waiver and are subject to the conditions contained in the FCC's orders." SBC filed its alleged cost-based tariff for payphone services on May 19, 1997.

The Commission disagrees. First, we agree with Verizon that it would be contrary to law for the Commission to hold Verizon to the regulatory bargain struck by certain BOCs and the FCC with regard to the issuance of refunds because the FCC exceeded its jurisdictional authority when it required non-BOC ILECs to file state tariffs for payphone services pursuant to the NST in the Payphone Clarification Order. Any regulatory bargain to issue refunds cannot be extended to non-BOC ILECS on the basis of an improper assertion of jurisdiction.

Second, if the refund obligation in the *Limited Waiver Order* were applied to approved rates including SBC's, that order would necessarily be contrary to Illinois law and the Supreme Court's holding in

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. IPTA has not plied [its] laboring oar with any great degree of diligence, and cannot be heard to complain that paying high pay phone rates over an extended period is somehow the Commission's, Staff's, SBC's or Verizon's fault, and not its own."

Arizona Grocery. Notwithstanding IPTA's misstatement of the relevant case law[17] and its application to the facts of this case, there is no legal basis for ordering a refund based upon the record in this case.

Moreover, we will not consider arguments based on the letter from Michael Kellogg to the FCC because Mr. Kellogg's letter is not in the record in this proceeding, nor is any evidence of the meaning or intent of that letter. The Act requires that the IPTA's construction of the Kellogg letter be supported by placing the letter itself, plus any relevant evidence of its meaning or intent, in the record. 220 ILCS 5/10-103. The IPTA did not do so, and the Commission need not address it further.

We therefore reject the IPTA claim that its members are entitled to refunds from April 15, 1997 to the present.

VI. Finding and Ordering Paragraphs

The Commission, having considered the entire record herein, and being fully advised in the premises, is of the opinion and finds that:

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[17] For example, IPTA argues in its Brief on Exceptions that the Proposed Order's reliance on Independent Voters, supra, is "intriguing." That case was properly cited in the Order for the proposition that refunds from Commission approved rates are inappropriate. IPTA in its discussion incorrectly argues that this decision supports retroactive refunds of approved rates. In fact, after a remand, the Supreme Court ordered a refund for the period occurring between its holding that portions of the rate were improper and the time that new rates were approved by the Commission. 117 Ill.2d, at 105. Thus, the Court ordered a refund only for the period when the rate was not approved.

(1) Illinois Bell Telephone Company, d/b/a/ SBC ("SBC"), is an Illinois corporation with its principal place of business at 225 West Randolph St., Chicago, Illinois. SBC is a wholly owned subsidiary of SBC Corporation, headquartered in Chicago, which is in turn a wholly owned subsidiary of SBC Corporation, headquartered in San Antonio, Texas. SBC is an ILEC, authorized to provide local and intraMSA interexchange telecommunications services in Illinois within its designated service territory;

(2) Verizon North, Inc. and Verizon South, Inc. are wholly owned subsidiaries of Verizon Communications. Verizon Communications was formed by the merger of GTE Corporation and Bell Atlantic Corporation. The Commission addressed that occurrence in Docket No. 98-0866. Verizon is an ILEC, authorized to provide local and intraMSA interexchange telecommunications services in Illinois within its designated service territory;

(3) the Commission has jurisdiction over Illinois Bell Telephone Company and Verizon North, Inc. and Verizon South, Inc. and of the subject matter of this docket;

(4) the statements of fact set forth in the prefatory portions of this Order are supported by the record and are hereby adopted as findings of fact;

(5) the Commission finds the current imputation standard, as contained in Section 13-505.1 of the Public Utilities Act and 83 Illinois Administrative Code Part 792, is the most appropriate means to determine whether Verizon and SBC satisfy the federal requirement that payphone operations not be subsidized by noncompetitive service offerings;

(6) the Commission finds that SBC has passed the imputation test;

(7) the Commission finds that the corporate overhead expenses shown by Verizon as a negative expense should not be included in the imputation test. Corporate overhead should not be included as part of an imputation test, except where the rate for a service that is imputed into the test incidentally includes some allocation for overhead expenses;

(8) the Commission finds that Verizon's treatment of the pension settlement gains credit in the 1999 test year is inappropriate. It is inappropriate to include such a one-time gain in a

forward-looking imputation analysis. Therefore, the Commission finds that a value of zero should be included for corporate overhead expense in Verizon's test;

(9) the Commission finds that Verizon's treatment of PICC charges and E-911 surcharges is appropriate;

(10) the Commission finds Verizon's treatment of E-911 surcharges appropriate;

(11) the Commission finds that Verizon should include certain semi-public payphone expenses in its calculations;

(12) the Commission also finds that Verizon must impute answer supervision and call screening and blocking expenses;

(13) when these changes are incorporated, we find Verizon's payphone offerings fail imputation by $99,326. Therefore, the Commission finds that based upon 1999 data, Verizon has not passed the imputation test and that cross subsidization was occurring. However, Verizon has established that it has increased its coin drop rate. As a result of this occurrence and decreases herein ordered for payphone access rates Verizon's pay phone rates now pass

imputation. The Commission views this as a sufficient solution to the cross subsidization problem and does not order any further remedy;

(14) the NST, 47 C.F.R. 61.49(g)(2), requires all LECs subject to its terms to have tariffed rates in effect for payphone access services that are based on the direct cost of that service, plus a just and reasonable overhead allocation;

(15) to the extent that the Order in Docket 88-0412 adopts rates that are not consistent with the NST, Section 276 preempts that determination. Further, we specifically held in our Order in 88-0412 that the rates adopted therein do "not prevent investigation of these rates during the term identified for compliance with the Act's requirements ...;"

(16) the Commission is not legally obligated to apply the NST to non-BOC ILECs because of FCC decisions, its own initiating order in this proceeding, or Section 771.600 of its regulations;

(17) in the interest of consistency and uniform regulation it is appropriate to require Verizon to comply with the NST as it has been articulated in the FCC decisions discussed above. Therefore, Verizon's Motion to Dismiss arguing that it should

not be required to comply with the NST is denied. The Commission agrees with Staff that its Cost of Service Rules require that all ILECs must demonstrate compliance with LRSIC, an analysis that for Commission purposes is identical to the NST;

(18) it is appropriate to use the Part 791 LRSIC Cost of Service Rules to determine whether the LECs have appropriately used the forward-looking direct costs in calculating their payphone access rates to determine compliance with the NST;

(19) neither SBC nor Verizon have demonstrated that their overhead loading methodologies comport with FCC-prescribed methods;

(20) neither SBC's nor Verizon's existing rates are in compliance with the NST;

(21) SBC's overhead allocation are based on an average percentage markup rather than the lowest percentage markup require by the FCC. SBC's proposed overhead allocations would result in excessive rates;

(22) Verizon's proposed overhead allocations are inconsistent with the FCC's NST. Verizon's methodology used USOA data instead of ARMIS data and is based on

historical rather than forward looking data. Verizon has failed to meet its burden of proof with respect to overhead allocation factors;

(23) the Commission finds that rates based upon the overhead loading factor total on page 33 of Staff's Initial Brief on Reopening is appropriate for both SBC and Verizon;

(24) both SBC and Verizon are required to apply the NST to their usage sensitive services;

(25) IntraLata or Intra MSA service is competitive and not subject to the NST;

(26) the NST and our Part 771.600 require the LECs to reduce the monthly charge assessed the IPPs by an amount equal to the EUCL;

(27) Verizon's treatment of PICC charges and E-911 surcharges is appropriate;

(28) the formula proposed by the IPTA for determining a reasonable rate based upon LRSIC is adopted. When determining a usage rate, EUCL and non-PICC rates should be shown as "zero" in the formula.

Direct Cost	Overhead Cost	Reasonable Rate
LRSIC +	LRSIC x Overhead - EUCL - No-PICC = Rate %	

(29) the IPTA's claims for refunds for past payments by its members from SBC and Verizon pursuant to the rates in effect since the 1995 Order of this Commission are denied;

(30) the compliance of Illinois Consolidated Telephone, Gallatin River Telephone and other ILECS not covered by this Order with the pricing provisions of the NST in provisioning pay telephone service and whether these other ILECS have removed subsidies from exchange and exchange access services will be evaluated in a subsequent phase of this investigation;

(31) the Commission may also consider enacting formal rules governing the pricing and provisioning of pay telephone services in a subsequent phase of this investigation.

IT IS THEREFORE ORDERED that the findings of fact contained in the prefatory portions of this Order are supported by the record.

IT IS FURTHER ORDERED that findings of fact contained herein are hereby adopted as formal conclusions of the Commission.

IT IS FURTHER ORDERED that after the date of this Order, SBC and Verizon shall adhere to the requirements, procedures and policies set forth in Findings (1) through (28).

IT IS FURTHER ORDERED that within thirty (30) days of the issuance of this Order, SBC and Verizon shall file compliance tariffs with the Commission that incorporate our findings and orders herein.

IT IS FURTHER ORDERED that any objections, motions or petitions in relation to this proceeding are hereby disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that this order is not final and is not subject to the Administrative Review Law.

By order of the Commission this 12th day of November, 2003.

(SIGNED) EDWARD C. HURLEY

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Public Telecommunications Association, an Illinois not for profit corporation	:	
	:	97-0225
Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of The Communications Act of 1934.	:	

ORDER

[ENTERED: December 17, 1997]

By the Commission:

I. PROCEDURAL HISTORY

On May 8, 1997, the Illinois Public Telecommunications Association (the "IPTA") filed a verified petition requesting that the Illinois Commerce Commission ("Commission") initiate an investigation to determine whether Illinois local exchange carriers' tariffs for payphone exchange services comply with the requirements of Section 276 of the Telecommunications Act of 1996, 47 U.S.C.§ 276 (the "FCA"), the Federal Communications Commission's

("FCC") orders in CC Docket 96-128[1], and Sections 13-505.1, 13-505.2, 13-505.3 and 13-505.4 of the Public Utilities Act (the "Act") (220 ILCS 5/13-505.1 through 13-505.4). The petition further requested that the Commission investigate whether the local exchange carriers, with the exception of Ameritech, have complied with the FCA's mandate that each local exchange carrier's payphone operations not be subsidized with revenue from noncompetitive exchange services or exchange access services. (47 U.S.C.§ 276(a)(1))

On June 17, 1997, the IPTA filed an amended petition. The amended petition limited the requested investigation to the tariffs for payphone exchange services filed by Illinois Bell Telephone Company, d/b/a Ameritech Illinois ("Ameritech"), GTE North Incorporated and GTE South incorporated ("GTE"), Central Telephone Company of Illinois ("Center), and Illinois Consolidated Telephone Company ("ICTC"), hereinafter collectively referred to as "the LECs." The amended petition requested that the Commission investigate whether the LECs' tariffs for payphone exchange services comply with the requirements of Section 276 of the FCA, the FCC's orders in CC Docket No. 96-128 and Sections 13-505.1, 13-505.2, 13-505.3 and 13-505.4 of the Act. The amended petition further requested that the Commission investigate whether the LECs, with

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[1] *In the Matter of the Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act Of 1996,* CC Docket No. 96-128, Report and Order, FCC 96-388 (released September 20,1996) ("Payphone Order"); Order on Reconsideration, FCC 96-439 (released November 8,1996) ("Order on Reconsideration"); Order, FCC 97-678 (Com. Car. Bur. released April 4,1997) ("Bureau Waiver Order"); Order, FCC 97-805 (released April 15,1997) ("Clarification Order).

the exception of Ameritech, have complied with the mandate in Section 276(a)(1) of the FCA, that their payphone operations not be subsidized with revenue from noncompetitive exchange services or exchange access services.

Petitions to Intervene in this proceeding were filed by the Illinois Independent Telephone Association (the "IITA"), Teleport Communications Group Inc. ("Teleport"), MCI Telecommunications Corporation ("MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), Sprint Communications Company L.P. ("Sprint"), Minimum Rate Pricing, Inc. ("MRP") and Coast to Coast Telecommunications, Inc. ("Coast"). Petitions to intervene not previously been granted by the Hearing Examiners are hereby granted. The City of Chicago filed an appearance.

Pursuant to due notice, a prehearing conference was held in this matter before duly authorized Hearing Examiners of the Commission at its offices in Springfield, Illinois on June 18, 1997. Thereafter, hearings were held on July 8 and August 21, 1997. Appearances were entered by counsel on behalf of the IPTA, GTE, Centel, ICTC, Ameritech, the IITA, Teleport, Commission Staff ("Staff"), AT&T, MCI and Sprint. At the prehearing conference, questions were asked to the IPTA's counsel in an attempt to clarify the relief sought in the amended petition and the basis for that relief. At the hearing on July 8, 1997, the Hearing Examiners set a schedule for the filing of responses to the IPTA's amended petition and replies to responses. Pleadings were subsequently filed by GTE, Ameritech, ICTC, Centel, Staff, the IPTA , and jointly by MCI and AT&T.

At the hearing on August 21, 1997, the parties agreed that the Commission has two choices in this contested proceeding: first, enter an order dismissing the amended petition, or second, enter an order authorizing the commencement of an investigation with the parameters of the investigation specified therein, followed by an investigation in a new docket. At the conclusion of the hearing on August 21, 1997, the record was marked "Heard and Taken."

A Hearing Examiners' Proposed Order was served on the parties. Briefs on Exceptions were filed by Ameritech, ICTC, Staff, MRP and Coast. Reply Briefs on Exceptions were filed by Staff, the IPTA and jointly by MCI and AT&T. These filings have been considered by the Commission in arriving at the decision herein.

II. IPTA REQUEST FOR INVESTIGATION

The IPTA seeks an investigation on the following three issues.

(1) Whether the LECs provide network services to payphone providers at a price that complies with the federally-mandated "New Services Test" (47 C.F.R. §61.49(g)(2)), which requires that such services be priced at the long-run service incremental cost ("LRSIC") plus a reasonable allocation of overhead. The investigation would require the Commission to determine the

cost-based price under the New Services Test for each network service provided to payphone providers and the amount of refunds, if any, owed to payphone providers who purchased network services from the LECs at rates which were not cost-based.

(2) Whether the LECs provide network services to their own payphone operations in a manner that discriminates against competitors. This investigation would require the Commission to determine the nature, number and price of unbundled network access services the LECs must provide to payphone providers in a nondiscriminatory manner.

(3) Whether the LECs[1] payphone operations, except those of Ameritech, should be classified as competitive, and whether the LECs, other than Ameritech, must produce evidence that their payphone operations pass an imputation test and aggregate revenue test to assure that such operations are not being

subsidized with revenue from noncompetitive services.

(IPTA's response to the motions filed by GTE, MCI, AT&T, ICTC, and Ameritech, pp. 2-3, and 21-22)

In support of its request,, the IPTA points to the following excerpts from §276 of the FCA (Amended petition, pp. 3-4):

(a) NONDISCRIMINATORY SAFEGUARDS. - After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service –

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) REGULATIONS. –

(1) CONTENTS OF REGULATIONS. – In order to promote competition among payphone service providers and promote the widespread deployment of

payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the [FCC] shall take all actions necessary (including any reconsideration) to prescribe regulations that-

* * *

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic and exchange access revenues . . . .;

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

* * *

> (E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

The IPTA indicates that the FCC, beginning with its Payphone Order, issued several orders adopting rules and regulations implementing Section 276 of the FCA. The IPTA states that the FCC held that several issues relating to the implementation of Section 276 would be the responsibility of state public service commissions. The IPTA indicates that one such issue is whether network services provided to payphone providers by local exchange carriers are in compliance with the requirements of Section 276. The IPTA notes that the FCC concluded:

> We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate and interstate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features

> they provide to their own payphone services. **The tariffs for these LEC payphone services must be:** (1)cost **based;** (2) consistent **with the requirements of Section 276 with regard, for example, to the removal of subsidies for exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services, [fn.].... We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276** .... Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the *Report and Order,* and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the *Report and Order* as revised herein; and 2) that in such case no further filings are required.

Order on Reconsideration, 1J163 [emphasis added]

Relying on this language, the IPTA concludes that the FCC has required the Commission to investigate whether LEC access services are nondiscriminatory, cost-based, and not being used to subsidize LEC payphone operations. (Amended petition, p. 5)

The IPTA further asserts that the FCC has concluded that the Commission must determine whether the prices for LEC intrastate network services provided to payphone providers satisfy the New Services Test. (Order on Reconsideration, at 11163, n. 492) The IPTA states that the New Services Test, codified at 47 C.F.R. §61.49(g)(2), establishes a price ceiling for noncompetitive payphone services. (Amended petition, pp. 5-6)

The IPTA states that the FCC has also required the Commission to determine whether each LEC has removed any subsidies flowing from noncompetitive basic exchange services to the LECs competitive payphone services. (Payphone Order, at U 180-187) The IPTA further notes that the FCC also concluded:

> In addition, the Payphone Reclassification Proceeding requires states to ensure that payphone costs from unregulated equipment and subsidies are removed from intrastate local exchange service and exchange access service rates.

(Bureau Waiver Order, at ¶2, See also, Clarification Order, at ¶10)

The IPTA states that the FCC further held that all payphone providers were entitled to receive the benefit of cost-based rates for exchange services from local exchange carriers as of April 15, 1997. (Clarification Order, at ¶2). The IPTA further states

that the FCC held that, to the extent that local exchange service prices are reduced as a result of applying the New Services Test, all payphone providers would be entitled to receive refunds for overpayments. (Id.)

The IPTA also asserts that, like Section 276 of the FCA, the Public Utilities Act precludes the LECs from subsidizing their competitive payphone services with revenue from noncompetitive services, and discriminating in favor of their competitive payphone services in the provision of noncompetitive services. (Sections 13-507, and 13-505.1 through 13-505.4)

The IPTA notes that GTE, Centel and ICTC have not classified their payphone services as competitive under Section 13-209. The IPTA asserts that payphone service is reasonably available from more than one provider in each market service area served by GTE, Centel and ICTC. The IPTA concludes that those payphone services are competitive services as defined in Section 13-209. (Amended petition, P. 7)

The IPTA also indicates that the Commission should investigate whether the LECs' coin line services are discriminatory and in violation of the Public Utilities Act. As an example, the IPTA states that the LECs have proposed a coin line service that requires any telecommunications carrier to adopt, for its own end use customers, the rate tables selected by the LEC payphone division for all intraLATA calls other than the initial coin drop. The

IPTA indicates that the LECs coin line offering requires that all competitors using the coin line service charge the same rates for non-local sent-paid calls that are preprogrammed into the central office by each LECs own payphone division. The IPTA further asserts that the rating for a local call (whether the initial coin drop will allow an end user to complete a 3 minute local call, 5 minute local call, or an untimed local call) is preset at the central office according to the LEC payphone tariffs. The IPTA states that another example of discrimination is the requirement that the coin line subscriber presubscribe all 0+ and 1+ calls to the intraLATA carrier selected by the LECs' own payphone divisions. (Amended petition, pp. 7-8)

The IPTA concludes that the most widespread availability of payphone services at competitive prices will be fostered by requiring that network services be nondiscriminatory and provided to all payphone providers at cost-based prices. The IPTA also concludes that its requested investigation is necessary to ensure that rates for non-competitive services do not subsidize competitive payphone operations. (Id, p. 8)

III. AMERITECH RESPONSE AND IPTA REPLY

Ameritech characterizes the IPTA's request as involving three subject areas. First, a determination as to whether the prices for services provided by the LECs to non-LEC payphone providers satisfy the New Services Test; second, a determination as to whether the LECs, other than Ameritech, have

properly priced their end user payphone rates and have removed all cross-subsidies from basic exchange access services to their payphone operations; as part of this investigation, the IPTA seeks a determination that the LECs[1] payphone services should be classified as competitive; and third, a determination that the LECs are obligated by FCC orders and the nondiscrimination provisions of the Act to provide certain additional features and functions in connection with the central office coin line, including, inter alia, establishing unique table rates for non-local, sent-paid calls and providing the ability to separately presubscribe intraLATA 0+ and 1+ traffic. (Ameritech's motion to limit scope of proceeding, pp. 2-3)

Ameritech states that with respect to the first two proposed areas of investigation, a generic, multi-carrier proceeding is inappropriate since the issues therein are unique to each LEC. As to the first issue, relating to pricing services pursuant to the New Services Test, Ameritech indicates that each LEC has its own unique service offerings, rate structures and costing methodologies for services provided to non-LEC payphone providers. As to the second issue, relating to cross-subsidies, Ameritech indicates that the lack of commonality between the LECs is exemplified by the fact that the IPTA is not seeking to include Ameritech in this phase of the investigation. Ameritech notes further that each LEC has unique end user payphone rate structures and rate levels, as well as unique basic local exchange rate structures and rate levels. Ameritech concludes that if the

IPTA believes that an investigation is warranted on the first two issues, the IPTA should initiate separate proceedings against individual companies.

Ameritech does not oppose a generic proceeding as to the third issue, relating to the unbundling of the LEC payphone network. It questions, however, why the proceeding should be limited to the four largest LECs. Ameritech indicates that if new service obligations are to be established between LECs and payphone providers, they should apply to all LECs in the state. Ameritech notes that the Commission used rulemaking proceedings to establish state-wide obligations of local exchange carriers to provide competing carriers with intraLATA presubscription and line side interconnection (Docket Nos. 94-0048 and 94-0049). Ameritech concludes that if the Commission determines that the third issue should be investigated, the type of investigation in the two cited dockets should be followed.

In reply, the IPTA indicates that the investigation should proceed in the consolidated manner described in its amended petition so that a uniform approach can be adopted by the Commission to determine whether the LECs have complied with Section 276 of the FCA. The IPTA states that the investigation should proceed in a sequential manner. The IPTA indicates that the first issue to be resolved is whether the existing network services provided to LEC payphone operations are discriminatory, and if so, what changes to the tariffed services are required to make them

nondiscriminatory. The IPTA states that after this issue is resolved, the costs associated with the nondiscriminatory tariffed services should be identified and the prices of those services should be set under the New Services Test. Then, an imputation test would be performed, taking into account the imputed cost of the network services.

The IPTA emphasizes that each of the four LECs identified in its amended petition are subject to the same legal requirements pertaining to the three issues. The IPTA notes that the New Services Test requires that the LECs identify the LRSIC of a service, plus a reasonable allocation of overhead The IPTA further notes that under 83 III. Adm. Code 791, "Cost of Service," all carriers that provide both competitive and noncompetitive services with greater than 35,000 access lines must perform LRSIC studies consistent with the terminology in Section 791.20 and the assumptions and methodologies set forth in that Part. The IPTA indicates that it is inconceivable that the four LECs named in its amended petition would have their own "unique cost study methodologies," as alleged by Ameritech. The IPTA further notes that in 83 III. Adm. Code 792, "Imputation," there is a single methodology for performance of an imputation test.

The IPTA acknowledges that all local exchange carriers in Illinois are prohibited from discriminating against independent payphone providers. The IPTA indicates, however, that the Commission can use the distinction between the large and small local exchange carriers, set forth in Section

13-504 of the Act, as the basis for a decision to limit the investigation to the LECs named in the amended petition.

IV. GTE, ICTC AND CENTEL RESPONSES AND IPTA/MCI REPLIES

GTE and ICTC each filed motions to dismiss the IPTA's amended petition. Centel filed its concurrence in the motions to dismiss. ICTC asserts that the Commission is under no statutory requirement to conduct the investigation requested in the amended petition. ICTC indicates that there is no language in Section 276 of the FCA that requires actions by state commissions to implement its requirements. ICTC states that Section 276 refers only to FCC action, and states that inconsistent state action is preempted. In a similar vein, GTE states that unlike the jurisdiction expressly granted to state commissions over negotiated and arbitrated agreements in Section 252 of the FCA, the jurisdiction over the provision of payphone services set forth in Section 276 applies only to the FCC. GTE further states that the Commission has no authority under Illinois law to enforce duties imposed only on the FCC by the FCA.

In response, the IPTA notes that Section 13-102 of the Act states:

> Sec. 13-102. Findings. With respect to telecommunications services, as herein defined, the General Assembly finds that:

> (d) the federal Telecommunications Act of 1996 established the goal of opening all telecommunications service markets to competition *and accords to the states the responsibility to establish and enforce policies necessary to attain that goal;*
>
> (e) it is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible;
>
> * * *
>
> (g) protection of the public interest requires changes in the regulation of telecommunications carriers and services to ensure, to the maximum feasible extent, the reasonable and timely development of effective competition in all telecommunications service markets.

The IPTA concludes that §13-102 of the Act recognizes not only that the 1996 changes to the FCA affected state policies, but also that the state was intended to be an equal partner with the FCC in the

implementation of the 1996 changes. The IPTA indicates that the FCA has not preempted the Commission's authority to implement policies with regard to intrastate services. It notes that Ameritech and GTE have cases pending before the Commission in which the Commission is investigating the most effective way to implement certain parts of the FCA. (GTE's unbundled network element case, Docket No. 96-0503; Ameritech's unbundled network element case, Docket No. 96-0458; and the Commission's investigation into Ameritech's compliance with Section 271 of the FCA, Docket No. 96-0404).

MCI also concludes that GTE and ICTC's arguments are without merit. MCI states that Sections 276(a)(1) and (b)(1)(B) clearly mandate that all subsidies from exchange and exchange access services must be removed from LECs[1] payphone offerings. MCI indicates that the FCA specifically addresses the removal of intrastate payphone subsidies from exchange and exchange access services. MCI states that the FCC concluded that "[w]e require pursuant to the mandate of Section 276(b)(1)(B), incumbent LECs to remove from their intrastate rates any charges that recover the cost of payphones. Revised intrastate rates must be effective no later than April 15, 1997." (Report and Order, CC Docket No. 128, FCC 96-388 (released September 20, 1996) at par. 186) MCI indicates that the FCC further found that "States must determine the intrastate elements that must be removed to eliminate any intrastate subsidies within this time frame." (Id.)

GTE and ICTC next contend that the New Services Test is inapplicable to them since they are not price cap carriers for purposes of FCC pricing regulation.

In response, the IPTA indicates that the FCC's orders state that the LECs must follow the New Services Test in setting prices for network services. The IPTA states that this test can be applied to all telecommunication carriers that provide noncompetitive services. The IPTA notes that the FCC found:

> Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we *conclude that the new services test is necessary to ensure that central office coin prices are priced reasonably.* Incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services, pursuant to Sections 61.38, 61.39, or 61.50(1) of the Commission's rules.

(Payphone Order, at ¶147 (emphasis added, footnote omitted); Order on Reconsideration, at ¶ 163, fn. 492)

GTE and ICTC next argue that the amended petition is not a proper request that their payphone services be declared competitive. They assert that a proceeding for the reclassification of a service under

Section 13-502(b) of the Act must be initiated by the filing of a complaint.

In response, the IPTA states that the Commission may investigate the proper classification of the LECs payphone service upon complaint or its own initiative. The IPTA notes that Section 13-502(b) provides in part:

> The Commission shall have the power to investigate the propriety of any classification of a telecommunications service on its own motion and shall investigate upon complaint. In any hearing or investigation, the burden of proof as to the proper classification of any service shall rest upon the telecommunications carrier providing the service.

ICTC states that there no facts set forth in the amended petition that support any allegations of subsidization and discrimination against it. ICTC asserts that the IPTA has asked the Commission to embark on a fishing expedition for facts that would indicate that ICTC and the other named LECs are not in compliance with the FCA and FCC orders. ICTC concludes that the amended petition should be dismissed as to it since there are no allegations of specific problems with respect to its payphone services. Similarly, GTE asserts that there is no factual basis for the requested investigation regarding unbundling of coin line functions. GTE states that the IPTA has not identified what the

existing coin line functions are or who possesses them, and has not specified why coin line functions should be unbundled.

GTE then argues that in its last rate case (Docket Nos. 93-0301/94-0041 (cons.), Order dated October 11, 1994), it "passed" an imputation test under Section 13-505.1 of the Act and an aggregate revenues test under Section 13-507 of the Act, having priced its payphone services in excess of LRSIC as required by Section 13-507 and 83 III. Adm. Code 791. GTE emphasizes that the IPTA has not alleged any change of circumstances with respect to GTE's cost of providing payphone services since that rate case. GTE concludes that there is no reasonable basis to investigate whether GTE's payphone service rates violate the anti-subsidization provisions of the Act or should be reclassified as competitive under Section 13-502(b).

In response, the IPTA asserts that GTE has misstated the context of the conclusion relating to the competitive/non-competitive classification of GTE's payphone services that the Commission reached in the rate case. The IPTA states that GTE classified its payphone services as noncompetitive in that case, and that the Commission accepted GTE's argument that the proper classification of GTE's payphone services was not an issue to be raised in a rate proceeding. The IPTA indicates that since GTE was not ordered to classify its payphone services as competitive, GTE was not required to pass an imputation test for all payphone services. Rather, the

IPTA notes that GTE was required by Section 13-505.1 of the Act to pass an imputation test only for the switched access portions of its payphone services.

GTE next contends that the IPTA's requested relief is premature. GTE states that by August 8, 1997, it will have in place tariffs to implement the various requirements of the recent FCC orders addressing coin telephone services. GTE notes that it has filed tariffs establishing a flat-rated Coin Operated Pay Telephone ("COPT") Coin Line Service and COCOT Answer Supervision Service (effective April 17, 1997), and decreasing the rates for Customer Owned, Coin Operated Pay Telephone ("COCOT") Service, Incoming Screening and Outgoing Screening (effective July 3, 1997). GTE further notes that it plans to file tariffs that reclassify payphone booths and shelves and local coin rates as competitive by October 7, 1997.

GTE also asserts that the IPTA erroneously believes that in an equal access environment, only the LECs should provide coin rating services for intraLATA calls after the initial coin drop and that only the payphone provider is required to presubscribe all 0+ and 1+ calls to the intraLATA carrier selected by the LECs own payphone divisions. GTE notes that by August 8, 1997, it must provide interLATA and intraLATA equal access to payphone providers. GTE states that it will then hand off toll calls originating at the service locations of the payphone providers to whichever carriers the payphone service providers presubscribe. GTE states that from that point on, it will be the duty of the

carrier PIC'd for coin intraLATA traffic to provide coin signaling for 1+ calls or subcontract such capability to another carrier. GTE notes that any rating of non-local sent-paid calls will, therefore, be the responsibility of the presubscribed carrier and concludes that any investigation of the discrimination issue raised by the IPTA will require the participation of the interexchange carrier ("IXC") industry. GTE suggests that, in the event the Commission enters an order beginning an investigation of this issue, it should include all IXCs doing business in Illinois as parties.

In response, the IPTA indicates that the IXCs are not necessary parties to an investigation that will determine if LECs are discriminating in favor of their own payphone services in the provision of noncompetitive services.

V. STAFF POSITION

Staff asserts that the Commission is not obligated under Section 276 of the FCA or FCC orders to investigate LECs' intrastate tariffs for payphone services. Staff notes that the FCC's Order on Reconsideration at 1J163 offers the states the options to review such tariffs to determine if they are cost-based, consistent with the requirements of Section 276 and nondiscriminatory, or to require the LECs to file the tariffs with the FCC for the FCC's review.

Staff concludes, however, that the Commission should conduct the investigation requested in the

IPTA's amended petition. Staff states that the issues raised by the IPTA, such as the possible need for further unbundling, should be investigated by the Commission to ensure effective competition in the payphone market pursuant to the directives of Section 276 of the FCA. Staff indicates that neither Congress nor the FCC has altered the states' jurisdiction over intrastate payphone services, except with respect to the local payphone rate.

Staff further notes that the Commission may initiate a reclassification proceeding on its own motion pursuant to Section 13-502(b) of the Act. Staff indicates that the IPTA has presented sufficient information to justify an investigation as to the unbundling of coin line functions. Staff also notes that the FCC has plainly stated that LECs must comply with the New Services Test. (Order on Reconsideration at ¶ 163)

VI. MCI AND AT&T REQUEST FOR INVESTIGATION

MCI and AT&T indicate that the scope of the investigation requested by the IPTA should be expanded to determine whether Ameritech is in compliance with Section 276(a)(1), which provides that payphone services shall not be subsidized directly or indirectly from telephone exchange service operations or exchange access operations.

MCI and AT&T assert that the Commission's order entered on June 7, 1995 in Docket No. 88-0142 (the "Settlement Order") does not demonstrate that

Ameritech has complied with Section 276 (a)(1). They note that the Settlement Order approved a settlement agreement between Ameritech and the IPTA that resulted in Ameritech's payphone services being declared competitive. (Settlement Order, p. 25) They further note that the Settlement Order acknowledged that declaring Ameritech's payphone services competitive would cause Ameritech's competitive services in the aggregate to incur costs that are $27 million in excess of the revenues generated by those competitive services. In other words, they indicate that the record demonstrated that Ameritech's competitive services as a whole would fall short by $27 million of passing the Aggregate Revenue Test set forth in Section 13-507 of the Act.[2] They state that to insure that Ameritech could comply with the Aggregate Revenue Test, as well as the imputation requirements of Section 13-505.1 of the Act, the Settlement Order adopted the IPTA/Ameritech stipulation which required that Ameritech allocate 40% of its operator service revenues to its payphone services, to account for $10.5 million of the shortfall. They indicate that the remaining $16.5 million of the shortfall was remedied by revenue increases attained through restructuring of Ameritech's payphone coin rates.

MCI and AT&T also emphasize that the Settlement Order concluded that Ameritech's

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[2] AT&T and MCI note that in order to pass the Aggregate Revenue Test, competitive services in the aggregate must be priced at a level that fully recovers their total long run incremental cost (as adjusted for imputation requirements) and the competitive services' fair share of the common overheads of the company.

payphone services are separate and distinct services from its operator assisted services. (Id, p. 25) They note that Section 13-204 of the Act defines local exchange service as "telecommunications service between points within an exchange, as defined in Section 13-206, or the provision of telecommunications service for the origination or termination of switched telecommunications services." They further note that Section 153(r) of the FCA defines telephone exchange service as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers telecommunications service of the character ordinarily furnished by a single exchange, and which is covered by the exchange charge." They conclude that under the Act and the FCA, Ameritech's operator services are exchange services and, therefore, may not provide a subsidy to Ameritech's payphone services.

In summary, MCI and AT&T conclude that the Settlement Order explicitly demonstrates that Ameritech's payphone services receive at least $10.5 million of subsidies from its operator services. They indicate that under Section 276(a)(1) of the FCA, Ameritech's payphone services must be scrutinized on a stand-alone basis to determine whether those services receive any subsidies from exchange or exchange access services. They emphasize that whether Ameritech passes an Aggregate Revenue Test for its competitive services in the aggregate or passes an imputation test for its payphone services is irrelevant to a determination that Ameritech's payphone services do not receive subsidies from exchange or exchange access services.

VII. AMERITECH RESPONSE

Ameritech contends that the position of AT&T/MCI is procedurally and substantively defective. Ameritech asserts that AT&T/MCI are attempting to collaterally attack a final Commission order in Docket No. 88-0142, which conclusively addressed the cross-subsidy issue. Ameritech indicates that if either MCI or AT&T believed that the Commission order in that docket was incorrect, they should have followed established procedures for its appeal, rather than seek to relitigate it two years after the fact.

Ameritech notes that the Act has several provisions designed to ensure that competitive and noncompetitive services are properly priced relative to each other. Ameritech indicates that the regulated company must meet both an imputation test and cross-subsidy ("aggregate revenue") test. Ameritech emphasizes that the Commission has approved all of the rate changes required to satisfy these tests. Ameritech notes that as a result of Docket No. 88-0142, it increased its payphone rates by approximately $16.5 million, and in its annual price cap filing, reduced other noncompetitive rates by the same amount. (Order in Docket No. 95-0182, June 21, 1995, pp. 5 and 11)

Ameritech indicates that the principal objection which MCI/AT&T appear to have with the Commission's order in Docket No. 88-0142 is its treatment of operator service revenues. Ameritech notes that as an integrated provider of both payphone and operator services, it took the position in that docket that it should be able to treat operator services generated from payphones and

other payphone services as a single business in determining whether the Act's pricing requirements had been met. Ameritech states that the IPTA contended that payphones and operator services were separate services and that operator service revenues were attributable to its payphone operation only to the same extent that Ameritech paid commissions to other, non-affiliated payphone providers on similar calls. Ameritech indicates that the Settlement Order adopted the IPTA position, and approved the use of a 40% "virtual" commission arrangement between Ameritech's operator services and its payphone service. Ameritech states that this approach provides appropriate compensation to its payphones for each operator service call generated by them and completed by Ameritech. Ameritech concludes that contrary to MCI/AT&T'S contentions, the 40% revenue attribution approved by the Commission was not a "subsidy," but rather was a reasoned resolution of a hotly contested issue. (Ameritech's response to MCI/AT&T, PP-3-4)

Ameritech asserts that the approach adopted by the Commission in Docket No. 88-0142 is not inconsistent with the requirements of Section 276 of the Act. Ameritech indicates that the FCA prohibits the explicit recovery of payphone costs in other rates, such as interstate access services. (Section 276(b)1(B)) Ameritech states that payphone costs have never been recovered in its intrastate carrier access service rates. Ill. Bell. Tel Co. v. Ill. Comm. Comm'n.. 286 Ill. App. 3d 340, 676 N.E. 2d 294, 297-98 (3d Dist. 1997) Ameritech indicates that

MCI/AT&T have failed to identify any other state rates in which payphone costs are being recovered.

Finally, Ameritech indicates that no FCC order requires that the Commission ignore operator service revenues in assessing payphone profitability. Ameritech asserts that MCI/AT&T's position is contrary to the rest of Section 276 and the FCC's orders requiring that payphone service providers be fairly compensated "for each and every completed intrastate and interstate call using their payphone." Ameritech indicates that, since a LEC payphone provider is entitled to fair compensation for all operator services and 800 calls that are originated or terminated by other carriers using their payphones, it makes no sense for MCI/AT&T to contend that the same LEC payphone providers are entitled to no compensation when they complete identical calls using its own facilities.

VIII. MCI/AT&T REPLY

MCI/AT&T indicate that the crux of Ameritech's argument appears to be that Ameritech's settlement of the payphone complaint in Docket No. 88-0142 and the Commission's order approving that settlement, stop the Commission from investigating whether Ameritech has complied with the requirements of the FCA, despite the fact that the FCA was enacted more than eight months after the entry of the Settlement Order. They indicate that Ameritech's arguments divert attention from the straight-forward issue raised by them: whether

Ameritech is in compliance with Section 276(a)(1) of the FCA.

They state that they do not take issue with the Settlement Order. Rather, they cite the Settlement Order as evidence that the costs of Ameritech's payphone operations would exceed its revenues if not for the fact that revenues from an exchange service (operator services) were attributed to Ameritech's payphone operations. They emphasize that Section 276(a)(1) of the FCA prohibits the use of revenues from exchange service operations or exchange access operations to offset the difference between payphone costs and revenues. They note that Ameritech's response does not dispute their assertion that operator services are exchange services under Illinois or federal law.

They indicate that Ameritech's position appears to be that the FCA only prohibits subsidies to its payphone services which flow from noncompetitive services. They state that the plain language of Section 276 supports their position that Ameritech's payphone operations must be scrutinized in isolation to determine whether revenues from any exchange service, competitive or noncompetitive, must be removed. They note that Section 276(b)(1)(B) of the FECA requires that the FCC "promulgate regulations that will "discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and *all intrastate* and interstate payphone *subsidies from basic exchange*

and exchange access revenues, in favor of a compensation plan . . .." (emphasis added)

IX. STAFF RESPONSE

Staff supports the investigation requested by AT&T/MCI for two reasons. First, Section 276 states that any state requirements that are inconsistent with the FCC's regulations shall be preempted. Staff indicates that if the Commission concludes that the use of operator service revenues to satisfy imputation and aggregate revenue tests is inconsistent with Section 276, it may need to revisit its decision in Docket No. 88-0142. Second, if the Commission concludes that operator services revenues cannot be used to satisfy imputation for payphone services, such a finding will affect not only Ameritech's imputation analysis but also the imputation analyses of the other LECs named in the investigation (assuming he Commission concludes that the other LECs payphone services should be reclassified as competitive).

X. COMMISSION ANALYSIS AND CONCLUSION

The Commission has been asked to begin an investigation into four aspects of the provisioning of pay telephone services in the State of Illinois. First, whether the four largest LECs are providing pay telephone services at prices that comply with the New Services Test codified at 47 C.F.R. §61.49(g)(2). Second, whether the pay telephone services of GTE, ICTC and Centel should be reclassified as competitive. Third, whether those

services, as well as the pay telephone services of Ameritech, are subsidy-free. Fourth, whether the LECs are providing services to themselves in the operation of their pay telephone operations in a manner that discriminates against competitors. The fourth inquiry would also require an examination of the requisite level of unbundling that would be required to end any discrimination.

Before turning to the substantive issues, one procedural issue requires resolution. That issue is whether the any of the inquiries requested herein are mandated by the FCA or the FCC. The IPTA asserts that the FCC has mandated the inquiry concerning the pricing of pay telephone services in accordance with the New Services Test in its November 8, 1996 Order on Reconsideration in FCC 96-439. Staff, GTE and ICTC argue to the contrary. GTE and ICTC note that Section 276 contains no express requirement for state action, while Staff notes that the FCC specifically provided that states that are unable to review tariffs for LEC pay telephone services could require LECs operating in their states to file tariffs with the FCC. (Order on Reconsideration at 1J63) The Commission agrees with Staff, GTE and ICTC that none of the inquiries requested here were mandated by the FCC. The next question is whether any of the allegations in the IPTA's petition warrant the exercise of the Commission's discretionary authority to enter upon the requested investigation.

In terms of LEC compliance with §276, the Commission concludes that such an investigation is

warranted. The Commission finds unavailing the arguments of the parties opposing this inquiry. The Commission first notes that none of the parties have argued that an investigation is unnecessary because a particular LEC is in compliance with §276. The parties have, instead, generally offered up arguments relating to the administrative inefficiency of undertaking an investigation shortly after the conclusion of previous dockets that ostensibly investigated the same matter. To the extent that the Commission recently entered orders addressing the pricing and provisioning of Ameritech and GTE pay telephones, those orders were entered prior to the passage of the FCA, which sets forth new standards for provisioning these services. To the extent that these standards have now changed, the Commission finds that a new examination of the issues is warranted. To the extent that ICTC has argued that the IPTA petition raises no particular complaint about the manner in which its pay telephones are provisioned, the Commission finds that this begs the question, which is whether the service is being provided in compliance with the new law. If any of the LECs show that their services are being provided in compliance with §276, the inquiry will end. If the evidence is to the contrary, the LECs or the Commission must take whatever steps are necessary to insure that the statute is followed.

This however, does not end the immediate inquiry. In reviewing the Order on Reconsideration, the Commission notes that the FCC has concluded that the deregulation of payphones was not limited to the larger LECs,

"because . . . the benefits the Commission observed in CPE [customer premises equipment] deregulation apply to payphones, and those benefits apply regardless of the size of the LEC." (Order on Reconsideration at 11144) Similarly, §276 provides that all subsidies from exchange and exchange access services must be discontinued, without regard to the size of the LEC. The Commission agrees that all users of pay telephones in Illinois should enjoy the benefits of CPE deregulation and the competitive provisioning of pay telephones, where warranted. The Commission concludes that the investigation concerning the pricing of pay telephone services according to the standards of Section 276 should include all LECs currently providing such services in Illinois, not just the large LECs named in this petition.

The next inquiry concerns the advisability of investigating the issue of LEC cross subsidization of pay telephone services by LEC exchange services or exchange access services, with the tangential issue of the necessity of declaring the pay telephone services of GTE, ICTC and Centel competitive services. The Commission again finds the arguments of the parties opposing such an investigation unavailing, based on reasoning similar to that recited. above. Only GTE has suggested that their pay telephone services are not being subsidized, pointing to the Commissions approval of the imputation and aggregate revenues tests performed in its last rate case. The Commission agrees with IPTA that in its last rate case GTE was required to pass an imputation test only for the switched access

portions of its pay telephone operations, not pay telephone operations in their entirety. Ameritech argues instead that the subsidies flowing to its pay telephone operations, if any, have been previously approved by the Commission in the Settlement Order. Based upon recent changes in Federal Law, subsidies from exchange services and exchange access services must end. (FCA §276 (a)(1); Order on Reconsideration at 1J163) To the extent that an investigation reveals cross subsidies, the LECs or the Commission must take all appropriate steps to end them. To the extent that the IPTA petition seeks to exempt Ameritech from this phase of the investigation, the Commission agrees with the position of AT&T and MCI that Ameritech must be included. The same logic applies here as above. To the extent the Commission approved Ameritech's provisioning of pay telephones through the use of revenues derived from operator services, the legal landscape has changed, and, possibly with it, the underpinnings of that decision. Finally, the Commission also concludes that this investigation should also extend to all LECs providing pay telephone services in Illinois. Neither the FCA nor the FCC Orders have any indication that the new regulations applicable to LEC pay telephone providers were to apply only to larger LECs. In addition, the Commission concludes that the investigation should also examine the issue of whether the pay phone services of GTE, ICTC and Centel should be classified as competitive. To the extent that GTE and ICTC have expressed the intention of filing tariffs declaring their pay phone

services competitive, proof of such a filing should satisfy this inquiry.

The final issue requiring resolution is the advisability of undertaking an investigation concerning the issue of LEC discrimination in the provisioning of pay telephone services to independent providers and the ancillary issue of the requisite level of unbundling of pay telephone services the LECs must provide. Here the Commission is unconvinced that, upon this record, such an investigation is warranted. While the IPTA has pointed to two problems it has ostensibly encountered, forced IXC presubscription and central office coin rating, the Commission is unconvinced that either of these matter fall within the purview of the proscriptions of Section 276 or the FCC orders. Those proscriptions include anti-discrimination provisions, but there is no indication in the pleadings or arguments of the IPTA that the LECs are not subject to the same limitations that are imposed upon the takers of pay telephone service. The Commission further agrees with GTE, that other than these two services, the IPTA has not identified what the existing coin line functions are or who possesses them and why they should be unbundled. In addition, the Commission notes that by August 8, 1997, LECs were required to provide interLATA and intraLATA equal access to payphone providers, thereby curing the two specific problems complained of in the petition.

XI. EXCEPTIONS AND REPLIES

As noted previously, many of the parties filed Briefs on Exceptions and Replies in response to the Hearing Examiners' Proposed Order. Three issues raised in those pleadings require responses. The first issue was raised by MRP and Coast. Both indicate that, while certificated, neither has begun operations. They asked that, in the event the Commission orders an investigation of the issues raised by the IPTA petition, it include only those entities currently providing payphone service in Illinois, but not all certificated pay phone providers. While the Commission is sympathetic to the request, it must be rejected. Section 276 requires all LECs to file tariffs for basic payphone services and unbundled functionalities. In fact, the requests of MRP and Coast suggest that one avenue of inquiry that should be explored in the proceeding ordered herein is the necessity of a Commission rule to govern payphone providers. The number of payphone provider petitions filed annually makes clear that the payphone provider universe is burgeoning. The Order of the Commission in this docket will be binding only upon the parties before it. In order to establish a policy applicable to ail similarly situated parties, a rule would be required. To that end the Commission directs that the investigation instituted herein should also examine the necessity of adopting a rule to govern payphone providers.

The second issue requiring a response was raised by ICTC, who argued that the IPTA's petition

is essentially similar to the petition filed by AT&T in Docket 96-0114,and should meet a similar fate, dismissal. In Docket 96-0114, AT&T asked the Commission to Order all LECs to publicly file: each of their existing interconnection or service agreements; new tariffs to remove ail resale restrictions on services offered to end users and; all existing contracts under which incumbent LECs provisioned services to end users. The Commission declined to grant the relief requested finding that: there was no requirement in the Federal Act that all existing contracts be filed; there was no need to file tariffs with all resale restrictions removed because the Federal Act specifically permitted reasonable resale restrictions and ; there was no need to grant the relief requested in the petition concerning the filing of pre-existing agreements because the FCC had set a schedule for this procedure in the First Report and Order in CC Docket No. 96-98/95-185 ("FCC Order"). The situation here is distinct. The Federal Act speaks specifically to the manner in which LECs are to provision and price payphone services. The Act further specifically provides that all inconsistent state regulations are preempted (47 USC 276(c)). The Payphone Order placed enforcement of the requirements on the states. The IPTA's petition has convinced the Commission that the manner in which LECs are pricing payphone service may not be in compliance with the Act, which has lead us to the conclusion that the requested investigation is warranted.

The final matter requiring response is the IPTA's assertion in its Reply Brief that its review of

Docket 88-0142 had convinced it that Ameritech's utilization of operator services revenues in support of its payphone services did not contravene the Act. The IPTA requested the Commission to examine this issue only in light of the decision in the Settlement Order. The Commission declines. The Commission is again sympathetic to the IPTA's plight. The Settlement Order allowed Ameritech to use 0+ revenues in support of its payphone operations but called upon it to provide an equal amount of revenue to independent payphone providers that presubscribe their operator services to Ameritech. The IPTA notes that, since the entry of the Settlement Order, Ameritech has been compensating payphone providers in a non-discriminatory manner, from which it concludes that Ameritech's payphone operations are not being subsidized with revenue from non-competitive services and should not be investigated. The Commission notes that the Act ,as interpreted by the FCC in the Payphone Order, condemns all subsidies from telephone exchange service or exchange access operation, with no distinction made between the competitive/non-competitive source of the subsidy. The Commission agrees with both the IPTA and Ameritech that all payphone providers are entitled to compensation for all of their 0+ traffic and does not envision this investigation ending that practice. The practice that must not be permitted however, is the subsidization of payphone service by telephone exchange service or exchange access services. If this necessitates a new compensation arrangement, that matter may be taken up in the docket opened hereunder, or in another proceeding

as appropriate. This also suggests that a rulemaking may be the ultimate outcome of the IPTA's request.

XII. FINDINGS AND ORDERING PARA-GRAPHS

The Commission, having reviewed the entire record and being fully advised of the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction of the parties and of the subject matter hereof;

(2) the recitals of fact, analysis and legal conclusions reached in the prefatory portion of this order are supported by the facts and authorities and are hereby adopted as the findings of fact and conclusions of law of the Commission;

(3) the following three matters proffered by the Illinois Public Telephone Association warrant investigation: LEC compliance with the pricing provisions of the New Services Test in provisioning pay telephone service; the necessity of declaring GTE, ICTC and Centel pay telephone services as competitive; and the removal of subsidies from exchange and exchange access services;

Steel, Inc., 497 U.S. 116, 128-29. Illinois' failure to order reparations conflicts with this Court's precedents.

2. Nor is this an instance where the regulator changed its determination retroactively. The 1995 ICC order determined that Respondent's rates complied with the state regulations. It is uncontested that Illinois did not have any cost-base requirement and that the ICC made no determination that the rates were cost based. This is not a case where the ICC later changed its mind and disagreed with the decision it had made. The subsequent 1996 Act and FCC orders imposed new prospective obligations on Respondent. Respondent self determined whether it complied with the federal requirements. The Illinois decision barring refunds under the filed rate doctrine violates this Court's previous holdings not only in *Arizona Grocery* and *Maislin*, but, as noted by the Ninth Circuit's citations of *Reiter* and *Transcon Lines*, the whole body of this Court's precedents on the filed rate doctrine.

Respondent mistakenly argues that the FCC relied on the states to determine whether existing state tariffs were preempted for failure to comply with the new services test. Br. in Opp. 16 – 17. The FCC had already decided that all noncompliant tariffs are preempted. *First Payphone Order* at ¶147. The states were to adjudicate and enforce this requirement. For tariffs already filed, states were directed to consider the federal requirements and determine whether further investigation was necessary.[8] Petitioner immediately requested that Respondent's tariffs needed further investigation and the ICC agreed. Pet. App. 114a – 116a, 144a – 146a, 153a – 155a. Upon its initial review of the cost basis of Respondent's tariffed rates, the ICC adjudicated that

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[8] *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 F.C.C.R. 21233 (1996), ¶163 *("Payphone Reconsideration Order").*

they violated the federal requirements. Pet. App. 110a, Finding 20.

Respondent's repeated claims that it was obligated to charge non-cost-based rates pursuant to the 1995 ICC order are duplicitous. Br. in Opp. 16-18. The FCC ordered Respondent to have federally compliant state tariffs filed by January 15, 1997 and effective no later than April 15, 1997. Respondent's argument purports that state law prevented it from complying with federal law. Meanwhile, Respondent's own actions belie its position. It self-certified that it had complied with the federal requirements by April 15, 1997, to be eligible to collect federal dial around compensation. Respondent's argument not only purports to elevate state law over federal law, it seeks to reward Respondent for maintaining contradictory positions. It makes a mockery of 11 years of efforts to implement Congress' directives. Such behavior cannot be countenanced.

C. Respondent's Alternative Grounds for Affirmance Are Unfounded.

Lastly, Respondent proposes that two alternative grounds exist to affirm the Illinois court, despite its error regarding the filed-rate doctrine: 1) that Petitioner is barred by estoppel and waiver through the 1995 Stipulation and Order; and 2) that Petitioner failed to perfect its claims for refunds. Br. in Opp. 13-14. These are red herrings.

1. The ICC has already rejected Respondent's argument that the 1995 Stipulation and Order barred enforcement of the federal requirements. Pet. App. 47a – 49a, 55a – 58a. This decision was not appealed and is final.

2. Without citation to any authority, Respondent argues that refunds may only be awarded in cases initiated by complaint and not by a petition. Br. in Opp. 13 – 14. Neither the ICC nor the court denied refunds on this basis. Moreover, it is wrong as a matter of Illinois law. See *Independent Voters of Illinois v. ICC*, 117 Ill.2d 90, 93 (1987) (where the Illinois Supreme Court granted a *petition*

for refunds made by an intervenor in a general rate case proceeding). Complaint for reparations may be made under 220 ILCS 5/9-252, which was cited as one of the bases in the Amended Petition granted by the ICC to open the investigation. Illinois procedure provides that "(c)omplaint may be made . . . by any person . . . by petition or complaint . . . " 220 ILCS 5/10-108. Neither the ICC[9] nor the Illinois court accepted Respondent's argument. Furthermore, no procedural objection was ever made by any party at the hearing and would be waived.

Respondent's true concern is that this case is recognized as the prime vehicle in the country to resolve this national conflict, since Petitioner filed to challenge the rates immediately after the FCC deadline for compliance, has established an indisputable violation of the federal requirement, and has exhausted every other available course of action. The Court should grant certiorari to resolve these irreconcilable conflicts to the uniform national regulatory scheme intended by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the Court should request the Solicitor General for its view in the matter, or, in the alternative, the petition for a writ of certiorari should be granted and the cause remanded with directions to refer the matter to the Federal Communications Commission under the doctrine of primary jurisdiction.

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[9] Respondent alludes to language in the ICC Order suggesting that Petitioner was lax in never formally challenging Respondent's rates. Br. in Opp. 13. This dicta is gross error on its face, and did not form the basis of any decision. Although the proceeding is entitled as on the ICC's own motion, the order, and the order in the original proceeding, ICC Docket No. 97-0225, reflect that Petitioner initiated the investigation by filing two verified petitions in 1997 complaining of Respondent's rates and requesting both an investigation and a refund of any excess charges. Pet. App. 21a – 22a, 114a-115a, 117a-118a, 153a-154a.

Respectfully submitted,

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JANUARY 2007

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No. 102166

IN THE SUPREME COURT OF ILLINOIS

The Illinois Public Telecommunications Association,	)	
Petitioner-Appellant	)	**Petition for Leave to Appeal from the Decision of the Appellate Court of Illinois, First Judicial District, Fifth Division, on a Petition for Review of the Orders of the Illinois Commerce Commission, No. 98-0195**
v.	)	
Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc., and Verizon South, Inc.,	)	
Respondents-Appellees	)	

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION MOTION FOR LEAVE TO FILE A MOTION TO RECONSIDER THE ORDER DENYING THE PETITION FOR LEAVE TO APPEAL, TO VACATE THE ORDER OF DENIAL, TO STAY THE APPEAL, AND TO REFER CERTAIN QUESTIONS TO THE FEDERAL COMMUNICATIONS COMMISSION

Pursuant to Illinois Supreme Court Rule 361 and *Johnson v. Colley,* 111 Ill.2d 468, 490 N.E.2d 685 (1986),

the Illinois Public Telecommunications Association ("Illinois Payphone Association") hereby moves for leave to file its Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission. In support of this motion, the Illinois Payphone Association states as follows.

1. The instant action originated through a petition filed by the Illinois Payphone Association with the Illinois Commerce Commission ("ICC") on May 8, 1997 alleging that incumbent telephone companies, such as Verizon North, Inc. and Verizon South, Inc. (collectively "Verizon"), and Illinois Bell Telephone Company f/k/a SBC Illinois n/k/a AT&T Illinois were charging independent payphone providers rates in excess of the cost-based rate requirements of the federal Telecommunications Act of 1996 and the related orders of the Federal Communications Commission ("FCC"). The petition requested the ICC to investigate these rates, establish cost-based rates in compliance with federal law, and to order refunds of the unlawful rates charged in excess of the federal requirements.

2. The ICC found that SBC Illinois and Verizon were charging rates in excess of their cost basis and ordered new rates to be filed. However, the ICC denied the request for refunds of the excess charges and otherwise failed to enforce FCC orders to implement the cost-based rate requirements effective as of April 15, 1997. On appeal, the Illinois Appellate affirmed the ICC's denial of remedies for past violations of the federal requirements.

3. On February 17, 2006, the Illinois Payphone Association filed its Petition for Leave to Appeal with this Court on the issue of the availability of remedies for the past violations of the federal cost-based rate requirements.

4. On March 6, 2006, the Massachusetts Supreme Judicial Court, the Massachusetts equivalent to the Illinois Supreme Court, issued an order staying a similar appeal brought by the New England Public Communications Council, a trade association representing independent payphone providers in the state of Massachusetts, on the same issue of the availability of remedies for the past violations of the federal cost-based rate requirements.

5. The Massachusetts Supreme Judicial Court referred the question of whether refunds of rates charged in excess of the federal cost-based rate requirements are required under the FCC's orders and requested the FCC's guidance in the Massachusetts Court's analysis of the appeal.

6. In May, 2006 members of the FCC's staff for the various FCC Commissioners and for the Wireline Competition Bureau held a number of meetings with representatives of independent payphone providers from 14 states, including Illinois, and with AT&T (SBC Illinois), Verizon, and BellSouth on the issue that is presented to this Court in the instant Petition for Leave to Appeal.

WHEREFORE, for the above reasons, the Illinois Public Telecommunications Association prays for leave to file its Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission to advise the Court of the recent activity of the Federal Communications Commission to address the issue of refunds and remedies for charges in excess of the federal requirements, as specifically raised by the Illinois Public Telecommunications Association in the Petition for Leave to Appeal filed before this Court.

Date: June 14, 2006

Respectfully submitted,

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No. 102166

IN THE SUPREME COURT OF ILLINOIS

The Illinois Public Telecommunications Association,	)	
Petitioner-Appellant	)	**Petition for Leave to Appeal from the Decision of the Appellate Court of Illinois, First Judicial District, Fifth Division, on a Petition for Review of the Orders of the Illinois Commerce Commission, No. 98-0195**
v.	)	
Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc., and Verizon South, Inc.,	)	
Respondents-Appellees	)	

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION MOTION TO RECONSIDER THE ORDER DENYING THE PETITION FOR LEAVE TO APPEAL, TO VACATE THE ORDER OF DENIAL, TO STAY THE APPEAL, AND TO REFER CERTAIN QUESTIONS TO THE FEDERAL COMMUNICATIONS COMMISSION

In accordance with Illinois Supreme Court Rule 361 and *Johnson v. Colley*, 111 Ill.2d 468, 490 N.E.2d 685 (1986), Petitioner-Appellant Illinois Public Telecommunications Association hereby respectfully moves for this Court to reconsider its order denying the Petition for

Leave to Appeal ("Petition") and to vacate its order of denial of the Petition, to stay the instant appeal, and to refer certain questions to the FCC relating to the requirements of Section 276 of the federal Telecommunications Act of 1996, 47 U.S.C. § 276 ("Federal Act"), as implemented by the orders of the Federal Communications Commission ("FCC").

Under Section 276 of the Federal Act and the orders of the FCC, local telephone companies are required to charge independent payphone providers cost-based rates for the use of telephone network services. These rates were required to be effective no later than April 15, 1997. The Illinois Commerce Commission ("ICC") determined that the rates charged by Verizon North, Inc., Verizon South, Inc. (collectively "Verizon") and Illinois Bell Telephone Company f/k/a SBC Illinois n/k/a AT&T Illinois ("SBC Illinois") exceeded the cost-based rate requirements. The issue presented in the Petition addresses whether independent payphone providers are entitled to a refund of charges by incumbent local telephone companies that exceeded the cost-based rates required under Section 276 of the Federal Act and the orders of the FCC. [1]

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[1] *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) ("*First Payphone Order*"), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 ("*Payphone Reconsideration Order*") *aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC,* 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC,* 523 U.S. 1046 (1998), Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("*Bureau Waiver Order*"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("*Bureau Clarification Order*"); *In the Matter of Wisconsin Public Service Commission: Order Directing Filings,* Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 31 (Jan. 31, 2002)("*Wisconsin Order*") *aff'd sub nom. New England Public Communications Council, Inc. v. FCC,* 334 F.3d 69 rehearing and rehearing en banc denied (Sep. 22, 2003), *cert*

Subsequent to the filing of the instant Petition, the Massachusetts Supreme Judicial Court, the Massachusetts equivalent of the Illinois Supreme Court, issued an order staying a similar appeal brought by the New England Public Telecommunications Council, a trade association representing independent payphone providers in the state of Massachusetts, on the same issue of the availability of remedies for the past violations of the federal cost-based rate requirements. Pursuant to the doctrine of primary jurisdiction, the Massachusetts Court referred the question of whether refunds of charges to independent payphone providers in excess of the federal cost-based rate requirements are required under the FCC's orders and under similar circumstances as found in the instant Illinois proceeding. The Massachusetts Court requested the FCC's guidance for the Court's analysis.

In response to the request by the Massachusetts Court, and in consideration of petitions filed with the FCC by trade associations representing independent payphone providers from the states of Illinois (Petitioner-Appellant Illinois Public Telecommunications Association), Mississippi (Southern Public Communications Association), New York (Independent Payphone Association of New York), and Florida (Florida Public Telecommunications Association) requesting similar guidance, the FCC engaged in a series of meetings on this issue in May, 2006 with representatives of independent payphone providers from 14 states, including the instant Petitioner-Appellant, the Illinois Public Telecommunications Association, and with representatives from the local telephone companies, including the parties of this proceeding, AT&T (SBC Illinois) and Verizon.

.den. sub nom. North Carolina Payphone Association v. FCC, 541 U.S. 1009 (2004) (collectively "*FCC Payphone Orders).*

The issues raised by the instant Petition before this Court are currently under active consideration by the FCC for a ruling as to the remedies required for violating the *FCC's Payphone Orders* that required cost-based rates to independent payphone providers to be in effect no later than April 15, 1997. It is expected that the FCC's ruling will provide guidance as to a uniform application by the states as to what remedies exist for past violations.

Respondents-Appellees AT&T (SBC Illinois) and Verizon have requested the FCC to exclude Illinois from the FCC's consideration based on this Court's May 24, 2006 order denying the instant Petition for Leave to Appeal. They argue that such denial estops Illinois from participating in the FCC's consideration of this issue. (See Exhibits 9 and 10 to the Illinois Payphone Association's Memorandum of Law.)

For 10 years the Illinois Payphone Association has endeavored to enforce the rights of its members as granted by the Federal Act and the orders of the FCC through two complete sets of hearings at the ICC, pursuing the appeal before the Illinois Appellate Court and the Illinois Supreme Court, and through numerous proceedings and filings before the FCC. *See Illinois Public Telecommunications Association v. FCC,* 117 F.3d 555 (D.C. Cir. 1997); *New England Public Communications Council, supra* (for a history of the numerous proceedings); and the Illinois Public Telecommunications Association Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders, CC Docket 96-128 (pending at the Federal Communications Commission).

After years of effort to establish, implement and enforce the rights of independent payphone providers, the ICC agreed with the Illinois Payphone Association that those rights had been violated. Now, the FCC has undertaken active consideration of what remedies federal law and policy

may require for violation of these federal requirements. The Illinois Supreme Court's order denying the Petition for Leave to Appeal should not impose an additional procedural impediment to the final resolution of enforcing whatever rights the independent payphone providers in Illinois are entitled.

The Illinois Public Telecommunications Association requests the Illinois Supreme Court to follow the lead of the Massachusetts Supreme Judicial Court in preserving and protecting whatever remedies independent payphone providers are entitled for violation of their rights under Section 276 of the Federal Act and the *FCC Payphone Orders*. The Court is respectfully requested to vacate its order denying the Petition for Leave to Appeal, to stay the proceedings on the appeal, and to refer to the FCC for its guidance questions regarding the remedies that are required for past violations of Section 276 of the Federal Act and the *FCC Payphone Orders* as stated in the accompany Memorandum of Law. Once this Court has the benefit of the FCC's guidance regarding violations of the federal requirements, the Court will be in the best position to make a determination as to the future handling of this appeal.

Wherefore, The Illinois Payphone Association respectfully moves this Court to reconsider its order denying the Petition for Leave to Appeal and to vacate the order of denial, to stay the proceedings on the instant appeal, and to refer to the FCC for its guidance the questions regarding the remedies that are required for violation of the federal requirements for cost-based rates, for the above reasons and those set forth in the accompanying memorandum of law.

Dated: June 14, 2006

Respectfully submitted,

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No. 102166

IN THE SUPREME COURT OF ILLINOIS

The Illinois Public Telecommunications Association,	)	
Petitioner-Appellant	)	**Petition for Leave to Appeal from the Decision of the Appellate Court of Illinois, First Judicial District, Fifth Division, on a Petition for Review of the Orders of the Illinois Commerce Commission, No. 98-0195**
v.	)	
Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc., and Verizon South, Inc.,	)	
Respondents-Appellees	)	

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO RECONSIDER THE ORDER DENYING THE PETITION FOR LEAVE TO APPEAL, TO VACATE THE ORDER OF DENIAL, TO STAY THE APPEAL, AND TO REFER CERTAIN QUESTIONS TO THE FEDERAL COMMUNICATIONS COMMISSION

Pursuant to Illinois Supreme Court Rule 361 and *Johnson v. Colley,* 111 Ill.2d 468, 490 N.E.2d 685 (1986) the Illinois Public Telecommunications Association ("Illinois Payphone Association") moves for reconsideration of the

Illinois Supreme Court's May 24, 2006 order denying the Illinois Public Telecommunications Association Petition for Leave to Appeal ("Petition"). (See also *Chicago Fire Fighters Union Local No. 2 v. City of Chicago,* 323 Ill.App.3d 168, 751 N.E.2d 1169 (1st Dist. 2001). The Illinois Payphone Association further moves for this Court to vacate the order of denial, to stay the instant appeal, and to refer certain questions specified herein to the Federal Communications Commission ("FCC") pursuant to the doctrine of primary jurisdiction.

The instant Petition addresses the issue of whether payphone providers are entitled to refunds of the rates charged by incumbent local telephone companies in excess of those required by federal law. Since the filing of this Petition, the Massachusetts Supreme Judicial Court, the Massachusetts equivalent of the Illinois Supreme Court, addressed the very same issue on behalf of the trade association representing the Massachusetts payphone providers. On March 6, 2006, the Massachusetts Court stayed the appeal in its proceeding and referred to the FCC the question of whether payphone providers are entitled to refunds back to April 15, 1997 for charges that exceeded the federal requirement for cost-based rates, seeking the FCC's guidance as to the federal requirements regarding this issue. Since the referral by the Massachusetts Court, the FCC has undertaken active consideration of whether federal law requires the refund of charges in excess of the federal requirements. Pursuant thereto, in May, 2006, the FCC engaged in numerous meetings with payphone providers and telephone companies from across the nation on this matter, including the parties to this appeal.

The Illinois Payphone Association respectfully moves for this Court to follow the lead of the Massachusetts Court in addressing this issue by vacating this Court's May 24, 2006 order denying the instant Petition for Leave to

Appeal, staying the proceedings on the instant petition, and similarly requesting guidance from FCC on whether federal law requires a refund to payphone providers of the charges that exceeded the cost-based rates required by Section 276 of the federal Telecommunications Act of 1996 ("Federal Act") and the implementing *FCC Payphone Orders.* [2]

I. BACKGROUND OF PROCEEDINGS UNDER THE FEDERAL ACT.

Section 276 was part of a sweeping restructuring of the telecommunications industry brought about by passage of the Federal Act. Prior to its passage, federal and state jurisdiction over telecommunications services was divided along the lines of the provision of interstate and intrastate services, respectfully. *See Louisiana Public Services Commission v. FCC,* 476 U.S. 355, 106 S.Ct. 1890 (1986). The Federal Act extended federal jurisdiction into certain areas of intrastate telecommunications, removing it from the states' exclusive control and establishing a federal regime

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[2] *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) ("*First Payphone Order*"), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 ("*Payphone Reconsideration Order*") *aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC,* 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC,* 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("*Bureau Waiver Order*"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("*Bureau Clarification Order*"); *In the Matter of Wisconsin Public Service Commission: Order Directing Filings,* Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 31 (Jan. 31, 2002)("*Wisconsin Order*") *aff'd sub nom. New England Public Communications Council, Inc. v. FCC,* 334 F.3d 69 rehearing and rehearing en banc denied (Sep. 22, 2003), *cert .den. sub nom. North Carolina Payphone Association v. FCC,* 541 U.S. 1009 (2004) (collectively "*FCC Payphone Orders).*

wherein the state commission participation is guided by federal agency regulations and orders. *See AT&T Corporation v. Iowa Utilities Board,* 525 U.S. 366, 378 fn. 6, 381 fn. 8, 119 S.Ct. 721, 730 fn. 6, 731 fn. 8 (1999).

Section 276 is one of the areas where federal jurisdiction was extended to intrastate services. One of the federal requirements imposed on the local exchange carriers ("LECs") that provided local telephone service, such as SBC Illinois, and, for a limited time, Verizon was that the rates for services provided to independent payphone providers must be cost based, in compliance with the FCC's new services test established in that agency's *Computer III* proceeding. The United States Circuit Court of Appeals for the District of Columbia succinctly describes the history of the FCC's implementation of Section 276's requirement for cost-based rates in *New England Public Communications Council, Inc. v. FCC,* 334 F.3d 69 (D.C. Cir. 2003). The Federal Appeals Court also held that the states must follow the FCC's requirements in implementing Section 276. *Id.* The FCC held that states must apply the federal requirement for LECs to charge cost-based rates effective no later than April 15, 1997. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 F.C.C.R. 20541 (1996), Order on Reconsideration, 11 F.C.C.R. 21233 (1996) (*"Payphone Reconsideration Order"*).

The instant proceedings originated from the Illinois Payphone Association's May 8, 1997 petition filed with the ICC alleging that the LECs were charging rates in violation of the federal cost-based requirements and requesting the ICC to enforce the federal cost-based rate requirements and to order refunds of any charges in excess of cost-based rates. The ICC determined that the rates of SBC Illinois and Verizon were not cost-based and ordered new rates established. However, the ICC denied the Illinois Payphone

Association's request for refunds of the charges collected in excess of the federal requirement. The Illinois Appellate Court affirmed that the ICC's denial of the refunds. On February 17, 2006, the instant Petition for Leave to Appeal was filed with this Court on the issue of the appropriate remedies required for past violations of the federal cost-based rate requirements.

A. Developments at the FCC Since the Filing of the Petition for Leave to Appeal.

On March 6, 2006, the Massachusetts Supreme Judicial Court was confronted with a similar request on appeal by the New England Public Communications Council, regarding the remedies for past charges in violation of the federal cost-based rate requirement. The Massachusetts Court ordered a stay of the appeal and submitted questions to the FCC requesting their guidance regarding the remedies required by the *FCC Payphone Orders* available to payphone providers for charges that exceeded the federal cost-based requirement. In particular, the Massachusetts Court requested the FCC's guidance in the following two questions:

> 1. In establishing new rates for wholesale payphone access services pursuant to the FCC's "new services test", is a state utility commission required under the FCC's Payphone Orders to order a BOC (Bell Operating Company) to refund the difference between the new lower rates and the previously existing state-tariffed rates, where (1) the state commission had earlier allowed the existing rates to remain in effect based on the BOC's certification to the commission that the rates were in compliance with the "new services test", without any new tariff filing or commission analysis or findings under the Payphone Order standards, and (2) subsequent to the

state commission's complete analysis applying the requirements of the Payphone Orders, the state commission lowered those BOC-certified rates based on a determination that (a) payphone access rates should be priced as a wholesale service and (b) such adjustment was required for the rates to be in compliance with the FCC's "new services test".

2. If such a refund is required under these circumstances, pursuant to the FCC's Payphone Orders, is the refund calculated from April 15, 1997, the date originally set by the FCC for BOC compliance with the Payphone Orders, to the date the new rates took effect?"

See Memorandum of Law Exhibit 1.

This request by the Massachusetts Count joined pending petitions by various state payphone associations requesting similar guidance from the FCC concerning remedies for violation of the *FCC Payphone Orders*.[3] Subsequent to the request by the Massachusetts Court, a series of *ex parte* meetings was conducted with the various FCC Commissioners' offices and with the FCC staff personnel, as permitted under the FCC rules.

On May 8, 10, and 18, 2006 numerous meetings on the issue of what remedies are required for violations of these federal requirements were conducted between representatives of payphone trade associations representing 14 states and members of the FCC staff. The Northwest

[3] Petitions requesting declaratory rulings have been filed with the FCC by the Illinois Public Telecommunications Association (Illinois), the Southern Public Communications Association (Mississippi), the Independent Payphone Association of New York ("IPANY"), the Florida Public Telecommunications Association ("FPTA"), and most recently, the Michigan Pay Telephone Association ("MPTA").

Public Communications Council, representing 11 states in the northwestern United States (Exhibit 2), the Florida Public Telecommunications Association (Exhibit 3), the Illinois Public Telecommunications Association (Exhibit 4-8), and the Independent Payphone Association of New (Exhibits 5-8) variously met with the FCC Chief of Staff – Dan Gonzalez, legal advisors to FCC Chairman Kevin J. Martin – Ian Dillner and Michelle Carey, legal advisor to Commission Michael J. Copps – Scott Deutchman, legal advisor to Commissioner Jonathan S. Adelstein – Scott Bergmann, legal advisor to Commissioner Deborah Taylor Tate – Dana Shaffer, and with the FCC Staff of the Wireline Competition Bureau, Bureau Chief Thomas Navin, Associate Bureau Chief Donald Stockdale, Pricing Policy Division Chief Tamara L. Preiss, Acting Assistant Division Chief Pamela Arluk, and Division Attorney Advisor Lynne Hewitt Engledow. An additional meeting with Bureau Chief Thomas Navin and Associate Bureau Chief Donald Stockdale was scheduled for June 22, 2006.

Representatives of the local telephone companies, including AT&T (SBC Illinois), Verizon (both parties to the appeal before the Illinois Supreme Court), and BellSouth, also met with the Staff of the FCC's Wireline Competition Bureau to discuss their position on the issue of the availability of remedies for violations of the *FCC Payphone Orders*. On May 30, 2006 and on June 8, 2006, these companies met with Thomas Navin, Donald Stockdale, Tamara Preiss, Pamela Arluk, Lynne Engledow, and Marcus Makes. (Exhibits 9, 10). Between the time of the meetings with the payphone trade associations and those with the local telephone companies, this Court issued its May 24th order denying the instant Petition. In the subsequent meetings with the FCC Staff, the local telephone companies relied on this Court's denial of the Petition for Leave to Appeal to argue that the Illinois payphone providers should be estopped, or excluded, from whatever determination the FCC

makes regarding federally required remedies for violation of the federal requirements. (See Exhibits 9, 10.)

B. Efforts By the Illinois Payphone Association to Enforce the Federal Act.

The Illinois Payphone Association has pursued the rights of its payphone provider members under Section 276 of the Federal Act and the *FCC Payphone Orders* in both the federal and state fora for 10 years. It participated in the original 1996 FCC proceedings to establish and implement the requirements of Section 276, being the lead party in the appeal of the initial FCC order. *Illinois Public Telecommunications Association v. FCC,* 117 F.3d 555 (D.C. Cir. 1997). After the FCC ordered the local telephone companies to establish cost-based rates to independent payphone providers, such rates to be effective no later than April 15, 1997, the Illinois Payphone Association initiated one of the first state enforcement proceedings in the country through its May 8, 1997 petition before the ICC, alleging violations of the *FCC Payphone Orders* and requesting a refund of all charges in excess of cost-based rates required by the FCC's new services test.

While pursuing enforcement through the state public utility commission, as directed by the *FCC Payphone Orders*, the Illinois Payphone Association continued to participate in the ongoing proceedings at the FCC regarding these requirements. *See New England Public Communications Council, Inc. v. FCC,* 334 F.3d 69 (D.C. Cir. 2003) for a summary of these proceedings. The Illinois Payphone Association succeeded in sustaining its position on cost-based rates at the FCC, in the U.S. Circuit Court of Appeals, and ultimately before the ICC in its finding that, despite their 1997 self-certifications to the contrary, neither SBC Illinois' nor Verizon's rates to independent payphone

providers were cost-based in compliance with the FCC's new services test.

When the ICC failed to order refunds of the excess charges, the Illinois Payphone Association pursued the issue on appeal to the Illinois Appellate Court, petitioning the Appellate Court to stay the proceedings and to refer to the FCC the question of what remedies are required for violations of the *FCC Payphone Orders*. When the Appellate Court denied the stay, the Illinois Payphone Association filed its own petition before the FCC for a declaratory ruling on the issue.

The FCC requested public comments on the July 30, 2004 petition filed by the Illinois Public Telecommunications Association for a declaratory ruling regarding the remedies available for violation of the *FCC's Payphone Orders*. This petition was followed on November 9, 2004 by a similar petition from the Southern Public Communications Association, and on December 29, 2004 by the Independent Payphone Association of New York. The FCC consolidated the proceedings on all three petitions. [4]

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[4] Although the FCC had requested, and received, comments regarding these petitions, at the same time the FCC was undertaking a massive of restructuring of its rules for the development of local telecommunications competition arising from the same Telecommunications Act of 1996. On December 15, 2004 the FCC announced an order reversing its policy for local telecommunications competition that was in effect for the previous eight years. *In the Matter of Unbundled Access to Network Elements, Order on Remand,* 20 F.C.C.R. 2533 (Released February 4, 2005). The FCC granted a transition period to March 11, 2006 for carriers then engaged in local competition under the prior requirements. Subsequent to, and in large part from, this reversal in FCC policy, both AT&T and MCI ceased their independent operations in competition with the incumbent Bell telephone monopolies and were acquired by these competitors, SBC acquiring AT&T and Verizon acquiring MCI.

The FCC transition period for the restructuring of local competition extended through March 11, 2006. Meanwhile, the

The FCC is now moving forward on the requests from payphone providers in numerous states to address the federal policy on what remedies are available where LECs have failed to comply with the federal requirement for cost-based rates. The Northwest Public Communications Council, representing eleven states, the formal petitions filed by the payphone providers from the states of Illinois, Mississippi, New York, Florida and Michigan, a letter requesting direction from the Oregon Public Service Commission, and the primary jurisdiction referral from the Massachusetts Court has now actively engaged the FCC's consideration of the issue presented to it by the Massachusetts Court and the various payphone trade associations.

Chairman of the FCC, Michael Powell, announced his resignation from that position effective shortly after the completion of the transition period. Another of the five commissioners, Commissioner Kathleen Abernathy resigned as of December 9, 2005. One of the two FCC vacancies has since been filled with the confirmation of Commissioner Deborah Taylor Tate. President Bush has nominated Robert McDowell to fill the fifth seat on the FCC. That appointment is currently pending approval by the U.S. Senate.

The FCC's restructuring of local telecom competition, the massive transition of the industry, departure of two of the five commissioners, and the appointment of a new Chairman resulted in significant limitations of the resources available at the FCC to address various other matters, including the payphone petitions. With the completion of the transition period for the local competition order, the appointment of a new Chairman, and the filling of one of two vacant slots on the FCC, the FCC now is proceeding to undertake an active consideration of the issue of the federal policy for remedies for violation of the federal requirements for cost-based rates to payphone providers, pursuant to the referral from the Massachusetts court.

B. The FCC Provides Direction to the State Implementation of Federal Policy Under the Federal Act.

Since the passage of the Telecommunications Act of 1996 established concurrent federal and state jurisdiction over local telecommunications regulation, it is not uncommon for the FCC to be called upon to issue rulings to ensure uniform application of federal telecommunications policy for the states to implement. On Section 276 alone, the FCC has been called upon on a number of occasions to give direction to the state implementation of the federal requirements. In one instance, the Wisconsin Public Service Commission held that it lacked state authority to review the Wisconsin LECs' compliance with Section 276. In response to a petition filed by the Wisconsin payphone providers, the FCC held that it would implement Section 276 proceedings for states that declined to implement the federal scheme. As a result the FCC undertook its own proceeding to enforce the Federal Act requirements as to local exchange and payphone operations in Wisconsin. *The Matter of Wisconsin Public Service Commission* 15 F.C.C.R. 9978 (March 2, 2000) ("*Bureau Wisconsin Order*"), *aff'd in part*, 17 F.C.C.R. 2051 (January 31, 2002) ("*FCC Wisconsin Order*"). In these orders the FCC provided direction to the states on how to implement the cost-based rate requirements of the *FCC's Payphone Orders*. *See New England Public Communications Council, supra.*

Although the ICC hearing in the instant proceeding had been concluded, and was in process of being briefed, both SBC Illinois and Verizon requested a new round of hearings to address the directives issued by the FCC. The Illinois Payphone Association noted that these matters had already been addressed and argued in the initial round of hearings, making a second set up hearings unnecessary. Yet,

the ICC ordered a fresh round of hearings to address the FCC directives in the *FCC Wisconsin Order*.

The FCC has also been called upon to review two other state commission orders that have addressed Section 276 in a manner inconsistent with federal policy. In response, the FCC issued declaratory rulings finding that the state commissions had apparently erred in the implementation of the Section 276 federal requirements. The North Carolina Utilities Commission and the Michigan Public Services Commission were instructed to re-evaluate their respective decisions to ensure compliance with the FCC's directives. *In the Matter of the North Carolina Payphone Association Petition for Declaratory Ruling, Oklahoma Local Exchange Carrier Petition for Declaratory Ruling, and Michigan Payphone Association Petition for Declaratory Ruling,* 17 F.C.C.R. 4275 (March 5, 2002). (*"North Carolina/Michigan Declaratory Rulings"*).

The procedural aspects of the Michigan proceedings are very similar to that before this Court. While the FCC was considering the issue raised in the Michigan Public Services Commission proceeding, the Michigan Appellate reviewed an appeal of the same order. The Michigan Appellate Court affirmed the Michigan Public Service Commission's decision that SBC Michigan and Verizon rates were in compliance with the FCC's new services test. *Michigan Pay Telephone Association v. Michigan Public Service Commission,* 2001 WL 1277446 (2001) (unpublished opinion). However, after the FCC issued its declaratory ruling, the Michigan Supreme Court vacated the Court of Appeals decision and remanded the case back to the state commission in light of the FCC order. *Michigan Pay Telephone Association v. Michigan Public Services Commission,* 466 Mich. 883, 646 N.W.2d 471 (2002) ("in lieu of granting leave to appeal, we VACATE Court of Appeals decision of October 23, 2001 and REMAND this

case to the Michigan Public Service Commission for reconsideration in light of the order of the Federal Communications Commission") (Exhibit 11).

On remand, the Michigan Public Service Commission held that, contrary to its original order, SBC Michigan and Verizon must account for certain changes in setting rates for payphone providers under the new services test, as directed by the FCC. To the extent that the existing rates exceeded that permitted by the new services test when these changes are taken into consideration, the Michigan Commission ordered SBC Michigan and Verizon to provide refunds to the payphone providers. *In the Matter of the Complaint of the Michigan Pay Telephone Association et al. against Ameritech Michigan and GTE North Inc.*, MPSC Case No. U-11756 (after remand) (March 16, 2004) ("Michigan Payphone Order").

SBC Illinois has itself requested Illinois Courts to stay proceedings while awaiting guidelines on federal law and policy under the Federal Act. For instance, in ICC Docket No. 01-0164 the ICC ordered certain state statutory obligations imposed on SBC Illinois. SBC Illinois appealed the ICC order to the Illinois Appellate Court, Fourth District, and requested a stay of the appeal while SBC Illinois pursued a complaint filed by it in the United States District for the Northern District of Illinois on questions of federal law and policy. *Illinois Bell Telephone Company v. Illinois Commerce Commission,* Illinois Appellate Court No. 4-02-0694 (4th Dist.). Before the United States District Court, SBC Illinois also requested an initial stay of the proceedings while awaiting further FCC orders providing guidance as to the requirements under the Federal Act on the premise that such guidance could impact the determination of state statutory requirements in issue. Although the federal Court case has since commenced proceeding, the 2002 appeal to the Illinois Appeal Court, Fourth District, is still pending at

SBC Illinois' request awaiting input from these federal proceedings.

The foregoing history fully supports the conclusion that the input of the FCC as the primary and ultimate arbiter of what are the requirements of Section 276 and the *FCC's Payphone Orders* is essential to this Court's consideration of the appeal.

II. FAILURE TO STAY THE PETITION FOR LEAVE TO APPEAL WOULD ONLY EXTEND AND FURTHER COMPLICATE THESE ALREADY COMPLEX PROCEEDINGS.

As previously noted, AT&T (SBC Illinois) and Verizon have recently met twice with the FCC since the Illinois Supreme Court's denial of the Petition for Leave to Appeal. SBC Illinois and Verizon have argued to the FCC that it should exclude Illinois from its current consideration of the remedies to be applied for violations of the *FCC Payphone Orders* on the basis that this Court's denial of the Petition for Leave to Appeal collaterally estops Illinois payphone providers from any FCC determination in this matter. (Exhibits 9 and 10.) It is evident from the public position taken by SBC Illinois and Verizon that they seek to exclude Illinois payphone providers from any determination rendered by the FCC on the theory of estoppel. However, the Federal Court of Appeals have held that in matters regulated by federal policy, common law doctrines of claim and issue preclusion that seek to extend full faith and credit to state court determinations are trumped by the Supremacy Clause of the United States Constitution where federal agencies are discharging their statutory duty to interpret and implement federal statutes and law in a uniform matter. Should this Court deny the Petition for Leave to Appeal prior to the FCC's issuance of its ruling regarding remedies for violations of the federal cost-based rate requirements, this

procedural posture would undoubtedly further complicate the already complex proceeding by raising new and additional procedural issues as the Illinois payphone providers seek to implement the FCC's directives.

The instant litigation has proceeded through very complex areas over a period of 10 years seeking to resolve new and previously unknown federal and state telecom policy requirements. Vacating the denial of the Petition for Leave to Appeal while staying the proceeding provides this Court with the opportunity to take into consideration the ruling and directives of the FCC prior to making its final determination in these proceedings. However, denying the Petition for Leave to Appeal at this time, prior to the anticipated FCC ruling, may only raise additional procedural complexities should the FCC rule that payphone providers are entitled to a refund of the charges in excess of the federally required cost-based rates. As payphone providers from Illinois seek implementation of federal law, new proceedings would be required to be initiated at which it is anticipated that SBC Illinois and Verizon will seek to prevent such proceedings under the guise of claim and issue preclusion. Granting the motion to vacate the order denying the Petition for Leave to Appeal, and staying the instant appeal, would avoid the additional complexities arising from SBC Illinois' and Verizon's expressed intent to raise issues of claim and issue preclusions to the enforcement of any FCC ruling in this matter.

The United States Circuit Courts of Appeal have addressed the relationship of state common law principles of claim preclusion and issue preclusion to a federal agency's subsequent order implementing federal policy. When the decisions of a state administrative agency or state court interfere with a federal agency's discharge of its statutory duty to interpret and implement a uniform and consistent policy applying federal law, the Supremacy Clause of the

United States Constitution prevails over common law principles claim and issue preclusion. *Arapahoe County Public Airport Authority v. Federal Aviation Administration,* 242 F.3d 1213 (10th Cir. 2001): s*ee also American Airlines, Inc. v. Department of Transportation,* 202 F.3d 788 (5th Cir.), *cert. denied*, 530 U.S. 1284, 120 S.Ct. 2762 (2000). In particular, a Federal Court has held that the Telecommunications Act of 1996 specifically supplants common law principles of claim preclusion and issue preclusion where the decisions of the state administrative agency or state court have failed to apply the federal requirements consistent with federal law and policy. *Iowa Network Services, Inc. v. Qwest Corporation,* 363 F.3d 683 (8th Cir. 2004).

Arapahoe County Public Airport Authority had a procedural history very close to the instant proceedings. In that case, Centennial Express Airlines complained that the Arapahoe County Public Airport Authority was in violation of federal statutes and federal grant requirements by refusing to allow Centennial Airlines to use the Arapahoe County Public Airport for regularly scheduled service. When Centennial Airlines commenced flight operations, the Arapahoe County Airport Authority obtained temporary and permanent injunctions against the airline in the state courts. One of the airline's shareholders, and ultimately the airline, filed complaints with the Federal Aviation Administration alleging that the Airport Authority was in violation of federal statutes and grant provisions. The Colorado state district court, and the ultimately the Colorado Supreme Court, granted a permanent injunction against Centennial Airlines' use of the Arapahoe County Public Airport for its scheduled service. Subsequent to the final decision of the Colorado Supreme Court, the FAA ruled that the Airport Authority's ban violated its federal grant requirements and federal law. The Airport Authority appealed the FAA decision, arguing that a federal agency's determination coming after the final

judgment of the Colorado Supreme Court was in violation of the doctrines of claim and issue preclusion. The Airport Authority argued that the Colorado Supreme Court determination was final, preclusive, and depositive of the issues addressed in the federal agency's order. The Tenth Circuit held that

> "common law doctrines (of claim and issue preclusion) extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy."
>
> *Arapahoe County Public Airport Authority,* 242 F.3d at 1219.

The U.S. Court of Appeals concluded that the federal agency is not required to give preclusive effect to the decisions of the Colorado Supreme Court. *Ibid.* The Court further noted that the federal agency, which was not a party to the other proceedings, has its own interest in assuring compliance with the federal statute and policy that the agency has been statutorily mandated to discharge.

Like here, the issue in *Arapahoe County Public Airport Authority* involved whether the respondent complied with conditions imposed upon it by federal law, as implemented by the federal administrative agency. This is an issue of federal supremacy. The Court held that the federal concerns are preeminent. A federal agency's statutorily mandated duty to implement those concerns tilts the balance in favor of the supremacy principles over common law preclusion. The Colorado Supreme Court's ruling would create a direct and significant conflict if deemed preclusive. Such conflict would frustrate the federal

agency's ability to discharge its statutory duty to interpret and implement federal statutes and law in a uniform manner and could lead to inconsistent enforcement of the federally mandated requirements. This strong policy of federal supremacy prevails over the extending full faith and credit to state determinations that are contrary to important and established federal policy. *Arapahoe County Public Airport Authority,* 242 F.3d at 1220-21.

In addressing similar issues of claim and issue preclusion specifically in the context of the federal Telecommunications Act of 1996, the Eight Circuit reached the same determination. It found that common law doctrines of *res judicata* and issue preclusion are trumped by the Supremacy Clause. *Iowa Network Services, Inc. v. Qwest Corporation,* 363 F.3d 683, 690, quoting *Arapahoe County Public Airport Authority,* 242 F.3d at 1219. *Iowa Network Services* specifically held that a review of the 1996 Telecom Act "convinces us that Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act, at least with respect to the issues here involved". 363 F.3d at 690.

Iowa Network Services had received an unfavorable determination from the Iowa Utilities Board regarding whether Qwest owed access fees to Iowa Network Services for the termination of wireless calls. Rather than appeal the state agency's final determination, Iowa Network Services brought a collection action in the federal district court. The district court decided that the Iowa Network Services claims had been decided by the Iowa Utilities Board and were barred by the doctrine of *res judicata.* The Eight Circuit reversed the district court, finding instead that Iowa's *res judicata* or claim preclusion law was trumped by the Supremacy Clause. The state agency was indisputably interpreting federal law. However, the Court held that the federal courts have the ultimate power to interpret the

provisions of the 1996 Telecom Act. If the "state commission is not regulating in accordance with the federal policy, they may bring it to heel." *Iowa Network Services,* 363 F.3d at 693 quoting *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378 n.6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). The Court noted that to allow a state administrative agency to make a determination of federal law, that binds a district court as to that interpretation through claim or issue preclusion, while other federal courts proceed to reach an inconsistent determination of federal law, is something that cannot be condoned. *Iowa Network Services,* 363 F.3d at 694.

It is not the intent of the Illinois Payphone Association to argue the merits of the Supremacy Clause trumping common law principles of claim and issue preclusion in the current proceeding, or to request the Illinois Supreme Court to render an opinion on this issue. This is only to direct this Court's attention to the fact that denial of the Petition for Leave to Appeal would only further complicate an already complex matter that has been the subject to 10 years of effort. By vacating the order of denial and staying the instant appeal, this Court would not only be advancing a fair and just determination of the Illinois payphone providers' rights, but would be helping to avoid even further issues and extended litigation.

III. AS WITH THE MASSACHUSETTS SUPREME JUDICIAL COURT, THIS COURT SHOULD REQUEST THE FCC'S GUIDANCE ON THE FEDERAL LAW AND POLICY REGARDING REMEDIES FOR VIOLATION OF THE FCC'S PAYPHONE ORDERS UNDER THE DOCTRINE OF PRIMARY JURISDICTION.

Primary jurisdiction is a common law doctrine "concerned with promoting proper relationships between the

courts and administrative agencies charged with particular regulatory duties." *Kellerman v. MCI Telecommunications Corporation,* 112 Ill.2d 428, 444, 493 N.E.2d 1045, 1052 (1986) citing *United States v. Western Pacific R.R. Co.,* 352, U.S. 59, 63, 77 S.Ct. 161, 165 (1956). The doctrine recognizes that both the court and the administrative agency have jurisdiction over the matter and seeks to balance the principles of administrative law and of the traditional system of law through coordinated action. *Far East Conference v. United States,* 342 U.S. 570, 72 S.Ct. 492 (1952).

The principle is applied to questions involving consideration of the economic relations of the regulated businesses, facts peculiar to the business or its history, and other relevant circumstances generally unfamiliar to the judicial tribunal, but well understood by the administrative agency. Primary jurisdiction rests in the administrative agency in cases requiring the exercise of administrative discretion, or requiring uniformity and consistency in the regulation of business entrusted to the agency. Judicial review is more rationally exercised by the preliminary resort to the agency for ascertaining and interpreting the circumstances underlying the legal issues, even though the facts after they have been appraised serve as a premise for legal consequences to be judicially defined. *Far East Conference,* 342 U.S. at 573-575, 72 S.Ct. at 494. See also *Texas & Pacific R. Co., v. Abilene Cotton Oil Co.,* 204 U.S. 426, 27 S.Ct. 350 (1907).

Primary jurisdiction also rests in the administration agency when seeking to construe an administrative order, determining whether it has been violated, or ascertaining what remedy the order accords a party. *Zapp v. United Transportation Union,* 727 F.2d 617 (7th Cir. 1984); *Rilling v. Burlington Northern Railroad Company,* 909 F.2d 399 (9th Cir. 1990). When resolution of the issues under the regulatory scheme has been placed within the special

competence of an administrative agency, the judicial process is suspended pending referral of such issues to the agency for its views. *Western Pacific R. Co., supra,* 352 U.S. at 64, 77 S.Ct. at 165.

Section 276 has restructured telecommunications regulations regarding the provision of payphone services, creating a uniform national scheme that has preempted inconsistent state laws. *New England Public Communications Council, supra; Illinois Public Telecommunications Association, supra.* The main issue an appeal concerns the implementation of that federal scheme as established through the *FCC Payphone Orders*. This matter proceeded before the ICC pursuant to the *FCC Payphone Orders* to implement and enforce the federal rights found under Section 276 of the Federal Act. *First Payphone Order, supra.* It comes before this Court on appeal pursuant to the procedures for review of ICC decisions established in the Illinois Public Utilities Act, 220 ILCS 5/10-201. Yet, the substantive matter remains the implementation of the federal scheme designed by the FCC.

Two explicit directives of the FCC are central to resolution of the pending appeal. First, the FCC explicitly required SBC Illinois and Verizon to provide network services to payphone providers at cost-based rates that satisfied the new services test, which rates "must be effective no later than April 15, 1997." *Payphone Reconsideration Order,* 11 F.C.C.R. at 21308 ¶ 163. The ICC has now determined that neither SBC Illinois nor Verizon provided said services at rates that complied with the new services test. *ICC Payphone Order,* Finding 20, at 46.

Second, the FCC emphasized that neither SBC Illinois nor Verizon were eligible under Section 276 to receive dial-around compensation for calls originating from their payphones until each provided rates that satisfied the

new services test as a condition precedent. Although the ICC Finding 20 establishes that neither had satisfied this prerequisite, the record reflects that SBC Illinois and Verizon have received hundreds of millions of dollars in dial-around compensation since April 15, 1997 based on their false self-certification of compliance. (R. Vol. 14, Tab 1, Ameritech Illinois (Currie), Ex. 4.0, p. 6, (Proprietary); R. Vol. 24, GTE Ex. 2.0, Appendix A, Line 11036 Per Call Compensation (Proprietary).) The effect of these violations of the *FCC Payphone Orders*, and the remedy addressing them, requires the exercise of the administrative discretion of the FCC and the application of a uniform, consistent national policy. The primary jurisdiction for addressing these matters is vested in the FCC.

Yet, a third issue involves interpretation of the FCC payphone orders as to the obligation of Verizon for refunds or other relief. In the initial orders, the FCC required all LECs, including GTE,Verizon's predecessor in Illinois, to provide payphone providers with cost-based rates. In the *FCC Wisconsin Order*, the FCC held that under Section 276(b)(1)(C) it only had jurisdiction to require the Bell Operating Companies to provide rates that satisfied the new services test. *New England Public Communications Council, supra.* As such, the FCC could not require Verizon, in Illinois, to provide cost-based rates under Section 276(b)(1)(C).

However, the FCC's jurisdiction over the provision of dial-around compensation arises under Section 276(b)(1)(A), which does provide for the FCC's jurisdiction over Verizon's Illinois operations. Pursuant to its implementation of Section 276(b)(1)(A), the FCC required Verizon to provide cost-based rates to payphone providers in Illinois as a prerequisite for receiving dial-around compensation. This prerequisite for payphone compensation was never appealed and remained binding on Verizon's

Illinois operations from April 15, 1997 until removed by the *FCC Wisconsin Order* on January 31, 2002. The interpretation and affect of these orders on Verizon's failure to provide cost-based rates, while receiving dial-around compensation from April 15, 1997 to January 31, 2002, is another matter peculiarly within the FCC's primary jurisdiction to resolve. [5]

At least seven state commissions have entered orders issuing refunds when payphone rates have been found to be excessive under the federal requirement for cost-based rates in compliance with the new services test. Other state commissions, including Illinois, have denied refunds for violations of the federal requirements. See Illinois Public Telecommunications Association Petition for Leave to Appeal, pp. 18-19. To assist it in reaching its determination of this issue, the Massachusetts Supreme Judicial Court has directed two questions to the FCC seeking its guidance on the federal remedy requirements for violations of the *FCC Payphone Orders*. This Court should similarly request the FCC's guidelines on the federal law and policy affecting the issues on appeal.

The Illinois Payphone Association respectfully submits that, in addition to vacating the May 24, 2006 order denying the Petition for Leave to Appeal, and to staying the instant appeal, the Court should request the FCC's guidance on the following questions:

> 1. Did the *FCC Payphone Orders* preempt state regulations effective as of April 15, 1997, including previous orders by the Illinois Commerce Commission, setting or authorizing rates for network telephone services provided to payphone

[5] For a review of the *FCC Payphone Orders* and the relevant facts in the record on these points, see the Illinois Public Telecommunications Petition for Leave to Appeal, pp. 9-14.

providers that were not cost-based in compliance with the FCC's new services test?

2. In establishing new rates for network telephone services to payphone providers pursuant to the FCC's "new services test", is the Illinois Commerce Commission required under the *FCC Payphone Orders* to order SBC Illinois to refund the difference between the new lower cost-based rates and the previously existing non-cost-based state-tariffed rates, where (1) the state commission had earlier allowed rates previously ordered by the commission according to state requirements to remain in effect based on SBC Illinois' certification to the commission that the rates were in compliance with the "new services test", without any new commission hearings or findings under the *FCC Payphone Order* standards, and (2) subsequent to a hearing and the state commission's complete analysis applying the requirements of the *FCC Payphone Orders*, the state commission lowered those rates based on a determination that such adjustment was required for the rates to be in compliance with the FCC's "new services test"?

3. If such a refund is required under these circumstances, is the refund calculated from April 15, 1997, the date originally set by the FCC for compliance with the *FCC Payphone Orders*, to the date the new rates took effect?

4. Where Verizon North, Inc. f/k/a GTE North, Inc. and Verizon South, Inc. f/k/a GTE South, Inc., received dial around compensation for their payphones effectively from April 15, 1997 to January 31, 2002, based upon their certification that their rates for network services provided to payphone providers were cost based in compliance the FCC's new services test, would Verizon North, Inc. and Verizon South, Inc. be subject to the same potential

liability to refund the difference between the rates charged and the lower cost-based rates determined by the state utility commission, after a hearing, for the period from April 15, 1997 to January 31, 2002?

CONCLUSION

WHEREFORE, for the above stated reasons, the Illinois Public Telecommunications Association respectfully moves the Illinois Supreme Court to reconsider its order denying the Petition for Leave to Appeal, to vacate its order of denial, to stay the instant proceedings on the appeal pending the determination by the FCC, and to request the FCC to provide to the Court with guidance on the following questions.

1. Did the *FCC Payphone Orders* preempt state regulations effective as of April 15, 1997, including previous orders by the Illinois Commerce Commission, setting or authorizing rates for network telephone services provided to payphone providers that were not cost-based in compliance with the FCC's new services test?

2. In establishing new rates for network telephone services to payphone providers pursuant to the FCC's "new services test", is the Illinois Commerce Commission required under the *FCC Payphone Orders* to order SBC Illinois to refund the difference between the new lower cost-based rates and the previously existing non-cost-based state-tariffed rates, where (1) the state commission had earlier allowed rates previously ordered by the commission according to state requirements to remain in effect based on SBC Illinois' certification to the commission that the rates were in compliance with the "new services test", without any new commission hearings or findings under the *FCC*

Payphone Order standards, and (2) subsequent to a hearing and the state commission's complete analysis applying the requirements of the *FCC Payphone Orders*, the state commission lowered those rates based on a determination that such adjustment was required for the rates to be in compliance with the FCC's "new services test"?

3. If such a refund is required under these circumstances, is the refund calculated from April 15, 1997, the date originally set by the FCC for compliance with the *FCC Payphone Orders*, to the date the new rates took effect?

4. Where Verizon North, Inc. f/k/a GTE North, Inc. and Verizon South, Inc. f/k/a GTE South, Inc., received dial around compensation for their payphones effectively from April 15, 1997 to January 31, 2002, based upon their certification that their rates for network services provided to payphone providers were cost based in compliance the FCC's new services test, would Verizon North, Inc. and Verizon South, Inc. be subject to the same potential liability to refund the difference between the rates charged and the lower cost-based rates determined by the state utility commission, after a hearing, for the period from April 15, 1997 to January 31, 2002?

The Illinois Public Telecommunications Association further recommends that the Illinois Supreme Court set a status date in six months from the order granting the instant motions and direct the Illinois Payphone Association to advise the Court of the status of the proceedings before the FCC.

June 14, 2006

Respectfully submitted,

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No. 102166

IN THE SUPREME COURT OF ILLINOIS

The Illinois Public Telecommunications Association,	)	
	)	**Petition for Leave to Appeal from the Decision of the Appellate Court of Illinois, First Judicial District, Fifth Division, on a Petition for Review of the Orders of the Illinois Commerce Commission, No. 98-0195**
Petitioner-Appellant	)	
v.	)	
Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc., and Verizon South, Inc.,	)	
Respondents-Appellees	)	

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION MOTION FOR LEAVE TO FILE A SUPPLEMENT TO ITS MOTION TO RECONSIDER THE ORDER DENYING THE PETITION FOR LEAVE TO APPEAL, TO VACATE THE ORDER OF DENIAL, TO STAY THE APPEAL, AND TO REFER CERTAIN QUESTIONS TO THE FEDERAL COMMUNICATIONS COMMISSION

Pursuant to Illinois Supreme Court Rule 361 and *Johnson v. Colley*, 111 Ill.2d 468, 490 N.E.2d 685 (1986), the Illinois Public Telecommunications Association ("Illinois

Payphone Association") hereby moves for leave to file this supplement to its Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission ("Motion to Reconsider"). In support of this motion, the Illinois Payphone Association states as follows.

1. The issue currently before this Court in the Illinois Payphone Association's Petition for Leave to Appeal regards what remedies are required as a matter of federal law and policy where a state public utilities commission has found that an incumbent telephone company has violated Section 276 of the federal Telecommunications Act of 1996, and the related orders of the Federal Communications Commission ("FCC"), that require the provisioning of local telephone services to payphone providers at cost-based rates.

2. On June 14, 2006, the Illinois Payphone Association filed its Motion to Reconsider.

3. In its Motion to Reconsider, the Illinois Payphone Association advised this Court that the FCC is in the process of actively considering the same issue addressed in the Illinois Payphone Association Petition for Leave to Appeal and requested this Court to vacate its order denying the Petition for Leave to Appeal, to stay the appeal subject to the pending FCC proceeding, and to refer certain common questions to the FCC for guidance.

4. In support of the Motion to Reconsider, the Illinois Payphone Association noted a number of recent activities and meetings at the FCC on this issue. See Motion to Reconsider, Memorandum, pp. 4 – 6.

5. Since the filing of the Illinois Payphone Association Motion to Reconsider, numerous additional

meetings and developments on this issue have transpired at the FCC. According to the public records of the FCC, the following have occurred:

a. June 16, 2006 representatives of AT&T and Verizon met with Michelle Carey, legal advisor to FCC Chairman Kevin J. Martin (Attachment A);

b. June 16, 2006 representatives of AT&T and Verizon met with Scott Deutchman, legal advisor to FCC Commissioner Michael J. Copps (Attachment B);

c. June 16, 2006 representatives of AT&T and Verizon met with Scott Bergmann, legal advisor to FCC Commissioner Jonathan S. Adelstein (Attachment C);

d. June 19, 2006, representatives of the American Public Communications Council, the national trade association representing payphone providers, met with FCC Deputy Associate General Counsel Christopher Killion, Assistant General Counsel Diane Griffin Holland, Joshua Dermott, Wireline Competition Bureau - Chief of the Pricing Policy DivisionTamara Preiss, and Acting Assistant Division Chief Pamela Arluk (Attachment D);

e. June 20, 2006, representatives of Qwest met with FCC Wireline Competition Bureau Associate Bureau Chief Donald Stockdale, Pricing Policy Division Chief

Tamara L. Preiss, Acting Assistant Division Chief Pamela Arluk, and Division Attorney Advisor Lynne Hewitt Engledow (Attachment E);

f. June 21, 2006 representatives of AT&T, Verizon, and BellSouth filed a written position on this matter with FCC Wireline Competition Bureau Chief Thomas Navin (Attachment F);

g. June 22, 2006 representatives of the American Public Communications Council met with Michelle Carey, legal advisor to FCC Chairman Kevin J. Martin (Attachment G);

h. June 22, 2006, the undersigned counsel, on behalf of the Illinois Payphone Association, and together with counsel for the Independent Payphone Association of New York and counsel for the American Public Communications Council, met with FCC Wireline Competition Bureau Chief Thomas Navin, Associate Bureau Chief Donald Stockdale, and Marcus Maher, Legal Counsel to the Bureau Chief (as previously indicated in the Motion to Reconsider, Memorandum, p. 6) (Attachment H);

i. June 22, 2006, the undersigned counsel, on behalf of the Illinois Payphone Association, and the counsel for the Independent Payphone Association of New York met with Ian Dillner, the new

legal advisor to FCC Commissioner Deborah Taylor Tate (Attachment I);

j. June 22, 2006 representatives of Qwest filed a written position on this matter with the FCC (Attachment J).

6. AT&T is the parent corporation of Illinois Bell Telephone Company f/k/a SBC Illinois n/k/a AT&T Illinois, and Verizon is the parent corporation of Verizon North, Inc. and Verizon South, Inc. All three subsidiaries are incumbent local exchange carriers in Illinois and are parties to the proceeding currently pending before this Court on the Illinois Payphone Association Petition for Leave to Appeal.

7. Attending the three June 16, 2006 FCC meetings was Mark Kerber, counsel for AT&T Illinois (SBC Illinois) in the proceedings that are currently on appeal before this Court (see Attachments A, B, and C).

8. The above facts have occurred since the filing of the Motion to Reconsider and further support the basis stated in the motion that the issue on appeal is under active consideration for a ruling by the FCC. These additional facts should be made available for this Court's consideration of the Motion to Reconsider.

Wherefore, the Illinois Public Telecommunications Association moves for leave to file this supplement to the Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission for the purpose of apprising the Court of additional activities taking place at the FCC on this issue and in further support of the Motion to Reconsider, for the reasons stated therein and in the memorandum of law accompanying said Motion to Reconsider.

Date: June 24, 2006

Respectfully submitted,

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No. 102166

IN THE SUPREME COURT OF ILLINOIS

The Illinois Public Telecommunications Association,	)	
	)	**Petition for Leave to Appeal from the Decision of the Appellate Court of Illinois, First Judicial District, Fifth Division, on a Petition for Review of the Orders of the Illinois Commerce Commission, No. 98-0195**
Petitioner-Appellant	)	
v.	)	
Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc., and Verizon South, Inc.,	)	
Respondents-Appellees	)	

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION MOTION FOR LEAVE TO FILE ADDITIONAL SUPPLEMENTAL AUTHORITY FOR ITS MOTION TO RECONSIDER THE ORDER DENYING THE PETITION FOR LEAVE TO APPEAL, TO VACATE THE ORDER OF DENIAL, TO STAY THE APPEAL, AND TO REFER CERTAIN QUESTIONS TO THE FEDERAL COMMUNICATIONS COMMISSION

The Illinois Public Telecommunications Association ("Illinois Payphone Association") hereby moves for leave to file the June 26, 2006 decision of the United States Circuit

Court of Appeals, Ninth Circuit, in *Davel Communications, Inc. v. Qwest Corporation,* ___ F.3d ___ (9th Cir. 2006) (attached) as additional supplemental authority for its Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission ("Motion to Reconsider"), pursuant to Illinois Supreme Court Rule 361 and *Johnson v. Colley,* 111 Ill.2d 468, 490 N.E.2d 685 (1986).

The Motion to Reconsider requests reconsideration of the denial of a Petition for Leave to Appeal of an Illinois Appellate Court decision that the refund of charges of state-tariffed rates, that violate federal law, are barred by the filed rate doctrine. The Motion to Reconsider further requests that the issue of refunds be referred to the Federal Communications Commission ("FCC") under the doctrine of primary jurisdiction. In *Davel Communications*, the U.S. Court of Appeals held (1) that the filed rate doctrine does not bar the refund of state-tariffed rates charged to payphone providers that exceed the cost-based rates required by Section 276 of the federal Telecommunications Act of 1996 ("Federal Act") and the orders of the FCC, and (2) that the issue of the applicability of refunds to payphone providers for the amounts charged in excess of the federal cost-based-rate requirement should be referred to the FCC under the doctrine of primary jurisdiction for a uniform application of federal law. The Ninth Circuit opinion is the first decision by a Federal Circuit Court of Appeals addressing these two issues that are the subject of the Motion to Reconsider pending before this Court. In support of this motion, the Illinois Payphone Association states as follows.

1. The issues currently before this Court in the Illinois Payphone Association's Petition for Leave to Appeal and the Motion to Reconsider include (1) what remedies are required as a matter of federal law and policy where a state

public utilities commission has found that an incumbent telephone company has violated Section 276 of the Federal Act, and the related orders of the FCC, that require the provisioning of local telephone services to payphone providers at cost-based rates, and (2) whether to refer this question to the FCC under the doctrine of primary jurisdiction.

2. On June 14, 2006, the Illinois Payphone Association filed its Motion to Reconsider.

3. In its Motion to Reconsider, the Illinois Payphone Association advised this Court that the FCC is in the process of actively considering the remedies issue addressed in the Illinois Payphone Association Petition for Leave to Appeal, and requested this Court to vacate its order denying the Petition for Leave to Appeal, to stay the appeal subject to the pending FCC proceeding, and to refer certain common questions to the FCC for guidance.

4. In support of the Motion to Reconsider, the Illinois Payphone Association noted a number of recent activities and meetings at the FCC on this issue. See Motion to Reconsider, Memorandum, pp. 4 – 6, Exhibits 1-10.

5. On June 24, 2006, the Illinois Payphone Association further submitted (by overnight delivery) a Motion for Leave to File a Supplement to its Motion to Reconsider, to advise the Court of 10 additional meetings or submissions addressing the remedies issues that took place at, or were filed with, the FCC in the 10 days since the Illinois Payphone Association filed its Motion to Reconsider on June 14, 2006. Motion for Leave to File a Supplement to Its Motion to Reconsider, pp. 2-4, Attachments A-J.

6. In its Memorandum of Law, filed in support of the Motion to Reconsider, the Illinois Payphone

Association noted that the Northwest Public Communications Council was meeting with the FCC on the refund issue on behalf of payphone providers in 11 states in the northwestern United States. Memorandum of Law, pp. 5, 8, Exhibit 2.

7. In its June 24, 2006 Motion for Leave to File a Supplement to Its Motion to Reconsider, the Illinois Payphone Association noted that Qwest, the incumbent local telephone company that provided the local telephone services to the payphone providers in those 11 states, met with the FCC on June 20, 2006, and on June 22, 2006 submitted a written submission to the FCC, on the remedies issue. Motion for Leave to File a Supplement to Its Motion to Reconsider, pp. 3 – 4, Attachments E and J.

8. On June 26, 2006, the United States Circuit Court of Appeals, for the Ninth Circuit, issued a decision in the case brought by payphone providers in those 11 states seeking refunds of the charges by Qwest that were in excess of the cost-based rates required by the Federal Act and the orders of the FCC.

9. In that proceeding, the United States District Court had dismissed the payphone providers' complaint seeking refunds of the excess charges on the basis that refunds are barred under the filed rate doctrine, since the charges were made pursuant to the Qwest state tariffs filed in those 11 states. *See Davel Communications v. Qwest Corp.*, ___ F.3d ___, Slip Op. at 7041, 7046 – 47.

10. In the instant matter on appeal before this Court, the Illinois Appellate Court also denied refunds of the excess charges on the basis of the filed rate doctrine. *Illinois Public Telecommunications Association v. Illinois Commerce Commission,* Illinois Appellate Court Order, pp. 6 – 9.

11. The Ninth Circuit reversed the District Court and held that the filed rate doctrine does not bar the refund of charges that were in excess of the federally required cost-based rates. The U.S. Court of Appeals found that "the filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff." *Davel Communications, supra,* Slip Op. at 7048.

12. Relying upon the decisions of the United States Supreme Court, the Ninth Circuit noted that carriers must comply with the comprehensive scheme provided by the statute and regulations, authorizing the agency to depart from the filed rate when necessary to enforce specific and valid regulations adopted under the federal statutes. *Ibid.*

13. In addition to holding that refunds are not barred under the filed rate doctrine, the Ninth Circuit also held that the primary jurisdiction for determining the applicability of refunds lies with the FCC. *Ibid,* Slip Op. at 7049 – 57.

14. The Ninth Circuit held that the interpretation of the FCC's orders, issued pursuant to the congressionally granted regulatory authority, "falls within the agency's primary jurisdiction where the order reflects policy concerns or issues requiring uniform resolution. (Citations omitted.) These decisions are grounded in the central focus of the primary jurisdiction doctrine, the desirability of uniform determination and administration of federal policy embodied in the agency's orders," finding the application of the doctrine of primary jurisdiction "particularly compelling" on the issue of refunds. *Ibid*, Slip Op. at 7054 – 55.

15. The congressional mandate for the FCC to regulate the payphone industry, consideration of the policy

considerations that gave rise to the FCC's 1996 and 1997 orders, the national scope of the issue, the need for uniform application, and "the purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence" all require referral of the issue to the FCC. *Ibid*, Slip Op. at 7055 – 57.

16. As previously noted to this Court, the Illinois Payphone Association originally brought the issue of compliance with the Federal Act and the orders of the FCC to the Illinois Commerce Commission ("ICC"), as directed by the FCC. After the ICC found that the carriers' charges violated the federal cost-based rate requirement, but denied any refunds of the excess charges, the Illinois Payphone Association appealed the denial of refunds to the Illinois Appellate Court and asked the Appellate Court to stay the proceedings and refer the refund issue to the FCC under the doctrine of primary jurisdiction. When the Appellate Court denied the referral, the Illinois Payphone Association initiated its own proceeding before the FCC for a ruling on the issue of refunds. Four other petitions have since been filed at the FCC. After the filing of the instant Petition for Leave to Appeal, the Massachusetts Supreme Judicial Court stayed a similar appeal by the Massachusetts payphone association and referred the refund issue to the FCC, spurring the FCC to move forward in its investigation and consideration of the issue. See Petition for Leave to Appeal, pp. 11, 13 – 15; Motion to Reconsider, Memorandum of Law, pp. 4 – 9; Motion for Leave to File a Supplement to Its Motion to Reconsider, *passim*.

17. The Ninth Circuit cited the pending FCC petitions and the referral by the Supreme Judicial Court of Massachusetts in noting that the FCC has indicated that it will determine this issue in due course. *Davel Communications*, Slip Op. at 7056.

18. The decision of the United States Circuit Court of Appeals, Ninth Circuit, was issued June 26, 2006, after the Illinois Payphone Association's filing of the June 14, 2006 Motion to Reconsider and after the filing of the June 24, 2006 Motion for Leave to File a Supplement to Its Motion to Reconsider, and could not have been submitted earlier.

19. The decision in *Davel Communications* is directly applicable to the issues pending before this Court and is the first Federal Court of Appeals to rule on the issues of (1) whether the refund of charges to payphone providers that exceeded the cost-based rates required under federal law are barred under the filed rate doctrine, and (2) whether the issue of refunds should be referred to the FCC under the doctrine of primary jurisdiction.

20. In addition to the petitions of the Illinois Payphone Association and four other state payphone associations requesting a ruling, the primary jurisdiction referral of the Massachusetts Supreme Judicial Court, and the letter requesting direction from the Oregon Public Service Commission, the Ninth Circuit U.S. Court of Appeals has now directed the issue of refunds regarding 11 other states to the FCC under the doctrine of primary jurisdiction for the application of federal policy and national uniformity.

21. The recent decision in *Davel Communications* further supports the Illinois Payphone Association's Motion to Reconsider. This additional authority should be made available for the Court's consideration.

Wherefore, the Illinois Public Telecommunications Association respectfully moves for leave to file this additional supplemental authority in support of its Motion to Reconsider the Order Denying the Petition for Leave to

Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission for the purpose of apprising the Court of the holding of the United States Circuit Court of Appeals, Ninth Circuit, on this issues before this Court.

Date: June 27, 2006

Respectfully submitted,

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STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of May, 2006.

Present: Robert R. Thomas, Chief Justice

Justice Charles E. Freeman
Justice Mary Ann G. McMorrow
Justice Thomas R. Fitzgerald
Justice Thomas L. Kilbride
Justice Rita B. Garman
Justice Lloyd A. Karmeier

On the twenty-fourth day of May, 2006, the Supreme Court entered the following judgment:

No. 102166

The Illinois Public Telecommunications Association, Petitioner v. Illinois Commerce Commission, Illinois Bell Telephone Company d/b/a SBC Illinois, Verizon North, Inc., and Verizon South, Inc., Respondents	Petition for Leave to Appeal from Appellate Court First District 1-04-0225 980195

The Court having considered the Petition for leave to appeal and being fully advised of the premises, the Petition for leave to appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twentieth day of July, 2006.

/s/ Clerk,
Supreme Court of the State of Illinois

5/9-252. Excessive or unjust charges; remedies

§ 9-252. When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

* * *

The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

5/10-108. Complaints; notice; parties

§ 10-108. Complaints; notice; parties. Complaint may be made by the Commission, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission. In the discretion of the Commission, matters presented by one complaint may be ordered separated, and matters upon which complaint may be founded may be joined. No objection shall be sustained to a separation merely because the matters separated are under the ownership, control or management of the same persons or corporation. No complaint shall be dismissed because of the absence of direct damage to the complainant. . . .

Ill. S. Ct. Rule 361. Motions in Reviewing Court

(a) Content of Motions; Supporting Record; Other Supporting Papers. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion. Motions shall be in writing and shall state the relief sought and the grounds therefor. If the record has not been filed the movant shall file with the motion an appropriate supporting record (Rule 328). When the motion is based on facts that do not appear of record it shall be supported by affidavit. Argument not contained in the motion may be made in a supporting memorandum. ...

(4) the following two matters proffered by the Illinois Public Telephone Association do not warrant investigation: discriminatory conduct by the LECs in provisioning their own pay telephone services; and the requisite level of unbundling to address the purported discrimination;

(5) the investigation instituted herein shall also examine the advisability and necessity of the Commission enacting formal rules governing the pricing and provisioning of pay telephone service in concert with the FCA and the FCC various order addressing the pricing and provisioning of payphone service;

(6) all pending petitions, motions and objections heretofore unresolved are resolved in a manner consistent with the ultimate conclusions contained in this order.

IT IS THEREFORE ORDERED that an investigation should be opened by the Commission on its own motion to explore the matters referred to in finding (3) above.

IT IS FURTHER ORDERED that the Staff of the Illinois Commerce Commission, within sixty days of the entry of this order and in consultation with the Illinois Public Telephone Association shall prepare and submit for entry by the Commission an order establishing a

docket to conduct the investigation found necessary herein.

IT IS FURTHER ORDERED that this Order shall be served upon all LECs currently authorized to operate in the State of Illinois and that all LECs authorized to operate in the State of Illinois at the time of the entry of the Order Initiating Investigation shall be made parties to the docket and shall be required to appear and adduce evidence in response thereto.

IT IS FURTHER ORDERED that subject to the provisions of §10-113 of the Public Utilities Act and 83 III. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 17th day of December, 1997.

(SIGNED) DAN MILLER

Chairman

(SEAL)

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: 97-0225

I, DONNA M. CATON, do hereby certify that I am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois vehicle Code.

I further certify that the above and foregoing is a true, correct and complete copy of the Order made and entered of record by said commission on December 17, 1997.

Given under my hand and seal of said Illinois commerce Commission at Springfield, Illinois, on December 22, 1997.

/s/
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS
LANSING OFFICE

[ENTERED: September 28, 2006]

TO ATTORNEYS OF RECORD:

Enclosed with this letter is the decision and opinion in the entitled matter. Under MCR 7.215(E), this opinion is the judgment of the Court of Appeals. The official date of the filing of this opinion is the date that is printed on it, and all time periods for further action under the rules will run from that date. See MCR 7.215(F) and (I), and MCR 7.302(C)(2)(b).

If the words *For Publication* appear on the face of this opinion, it will be published in the Michigan Appeals Reports. If the word *Unpublished* appears on the face of this opinion, it was not slated for publication at the time it was released. See MCR 7.215(A).

Although an opinion that is to be published is official as of the date that is printed on it, actual publication will be delayed until editorial work is completed in the Reporter's Office. This editorial work may result in slight changes in style or in citations when the opinion is published in the Michigan Appeals Reports.

I hereby certify that the annexed is a true and correct copy of the opinion filed in the record of the

Court of Appeals in the entitled matter and that the date printed thereon is the actual date of filing.

Very truly yours,

Sandra Schultz Mengel
Chief Clerk

SSM/las

Encl.

cc: Trial Judge or Agency

STATE OF MICHIGAN

COURT OF APPEALS

SBC MICHIGAN,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

MICHIGAN PAY TELEPHONE ASSOCIATION,

Appellee/Cross-Appellant.

UNPUBLISHED
September 28, 2006

No. 254980
MPSC
LC No. 00-011756

MICHIGAN TELEPHONE ASSOCIATION,

Appellant/Cross-Appellee

v

No. 261341
MPSC
LC No. 00-011756

MICHIGAN PUBLIC
SERVICE COMMISSION and
SBC MICHIGAN, d/b/a/
AMERITECH MICHIGAN, f/k/a
MICHIGAN BELL TELEPHONE
COMPANY,

Appellees,

and

VERIZON NORTH, INC., f/k/a/
GTE NORTH, INC.,

Appellee/Cross-Appellant.

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIUM.

In Docket No. 254980, SBC Michigan (SBC) appeals and the Michigan Pay Telephone Association (MPTA) cross-appeals an order on remand entered on March 16, 2004 by the Michigan Public Service Commission (PSC) granting in part and dismissing in part the MPTA's complaint. In Docket No. 261341, the MPTA appeals[1] from the March 16, 2004, order and the PSC's February 10, 2005, order denying rehearing, and Verizon North, Inc., f/k/a GTE North, Inc. (Verizon), cross-appeals from the March 16, 2004, order. These cases have been consolidated for purposes of hearing and decision. We affirm in each case.

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[1] The MPTA raises the same issues as both appellant and cross-appellant.

I. Underlying Facts and Proceedings

As a general rule, payphone service in Michigan is provided by local exchange carriers (LECs), such as SBC and Verizon, and independent payphone providers (IPPs). An IPP is an organization that operates any number of payphones.[2]

In 1984, the Federal Communications Commission (FCC) issued an order requiring LECs to offer payphone access services to IPPs. At that time, the payphones, known as "dumb sets," owned by LECs were operated by central office equipment, and were connected to the network through a line known as a coin line. In order to utilize this type of line, IPPs were required to purchase payphones known as "smart sets." These units function as a computer and have the ability to perform tasks such as answer detection, error messaging, etc., at the phone itself. Payphones owned by IPPs are connected to LECs' networks by customer owned coin operated telephone (COCOT) access lines.

In 1996, Congress enacted the Federal Telecommunications Act (FTA) of 1996, 47 USC 151 *et seq.*, which included provisions designed to enhance local competition. Section 276 of the FTA, 47 USC 276, prohibited LECs from subsidizing their own payphone service and from discriminating in favor of their service and against service offered by IPPs. 47 USC 276 provides in pertinent part:

> **(a) Nondiscrimination safeguards**
>
> After the effective date of the rules prescribed pursuant to subsection (b) of this

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[2] The MPTA is a trade organization comprised of IPPs.

section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that-

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled

individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access payphone service elements and payments in effect on such date of enactment,[3] and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry–IH (CC Docket No. 90-623) proceeding;[4]

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location

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[3] This subsection has been amended, and the phrase "on such date of enactment" has been replaced with the phrase "February 8, 1996."

[4] See *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards,* CC Docket No. 90-623, Report and Order, 6 FCC Red 7571 (December 20, 1991) *(Computer IIP).*

provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry inter-LATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

* * * *

(c) State preemption

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

In the *First Payphone Order*,[5] the FCC held that to implement the nonstructural safeguards requirement of 47 USC 276(b)(l)(C), LECs were obliged to comply with the nonstructural safeguards in the *Computer HI* order. LECs were required to unbundle payphone line services and file tariffs for those services using the New Services Test (NST), a forward-looking, cost-based test that establishes the direct cost of providing a new service as a price floor, and then adds a reasonable amount of overhead to compute the overall price of the new service.

The MPTA requested that the PSC initiate an investigation to determine whether the tariffs filed by Ameritech, now SBC, and GTE, now Verizon, complied with the FTA and the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.* The PSC declined to initiate a contested case, but ordered Ameritech/SBC and GTE/Verizon to provide the MPTA with access to cost studies approved in PSC Case Nos. U-l 1280 and U-l 1281.

Thereafter, the MPTA filed a complaint against Ameritech/SBC and GTE/Verizon alleging that: (1) the prices for network services charged by Ameritech/SBC and GTE/Verizon were .not consistent with the NST; (2) the services provided by Ameritech/SBC and GTE/Verizon were discriminatory; and (3) Ameritech/SBC and GTE/Verizon subsidized their payphone operations with revenue from noncompetitive services.

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[5] See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Red 20541 (September 20, 1996). The *First Payphone Order* and subsequent orders are known collectively as the *Payphone Orders*.

In an order entered on March 8, 1999, the PSC found that the MPTA failed to meet its burden of showing that Ameritech's/SBC's and GTE's/Verizon's payphone service rates did not comply with the NST. The PSC found that IPPs should be charged as business customers and not wholesale customers, and that the comparison of an IPP line to a business line was appropriate under the circumstances. The PSC also rejected the MPTA's assertion that the end-user common line (EUCL) charge should be deducted when calculating rates under the NST.

In *MPTA v Public Service Comm,* unpublished opinion per curiam of the Court of Appeals, issued October 23, 2001 (Docket No. 219950), another panel of this Court affirmed the PSC's decision. The MPTA sought leave to appeal this Court's decision to our Supreme Court, and filed a petition with the FCC seeking a declaratory ruling that the PSC's March 8, 1999, order was not consistent with the NST.

While those proceedings were pending, the FCC issued its *Wisconsin Order.*[6] In that order, the FCC noted that Congress enacted 47 USC 276 to promote competition between Bell Operating Companies (BOCs) and IPPs, and that 47 USC 276 required BOCs to set intrastate payphone line rates in compliance with the NST. The FCC asserted that its order would "assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276." *Wisconsin Order,*¶ 2.

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[6] *In the Matter of Wisconsin Public Service Commission: Order Directing Filings,* CCB/CPD No. 00-01, *Mem Op and Order,* FCC 02-25 (released January 31, 2002).

In the *Wisconsin Order*, the FCC concluded that: pursuant to 47 USC 276, it had jurisdiction over the intrastate payphone rates charged by BOCs, but not those charged by non-BOC LECs, *id.* at ¶¶ 31-42; the use of a forward-looking pricing methodology, such as total element long-run incremental cost (TELRIC) or total service long-run incremental cost (TSLRIC) was acceptable when applying the NST, *id.* at ¶¶ 43-50; states could continue to use UNE loading factors to evaluate a BOCs overhead allocation for payphone services, *id.* at ¶¶ 51-58; under the NST, a BOC cannot charge more for payphone line service than is necessary to recover "all monthly recurring direct and overhead costs incurred" in providing payphone lines, *id.* at ¶ 60, and when establishing a cost-based state-tariffed charge for payphone line service, a BOC must reduce its line charge by the amount of the federally tariffed charge, *id.* at ¶ 61; and that the NST applies to usage sensitive as well as to flat-rate elements of services offered to IPPs, i.e., "all payphone service line rates, including per-call or per-minute rates applicable to local usage." *Id.* at 163.

Following the issuance of the *Wisconsin Order*, the FCC instructed the PSC to "re-evaluate" its decision "concerning the pricing of BOCs' intrastate payphone line rates and overhead ratios to ensure compliance with the *Wisconsin Order*." Our Supreme Court vacated this Court's previous decision and remanded the matter to the PSC for reconsideration in light of the *Wisconsin Order*. *MPT A v Public Service Comm*, 466 Mich 883; 646 NW2d 471 (2002).

On March 16, 2004, the PSC issued an order on remand granting in part and dismissing in part the MPTA's complaint. The PSC rejected SBC's and Verizon's argument that the *Wisconsin Order*

substantially changed the NST by establishing that payphone rates, including overhead allocations, be established on the basis of forward-looking costs, such as TELRIC pricing, by requiring that the subscriber line charge (SLC) be removed from payphone rates, by stating that local usage was subject to the NST, and by allowing the inclusion, of certain retail costs in calculating direct costs. The PSC observed that the FCC had used forward-looking cost methodologies, such as TELRIC or TSLRIC, when applying the NST, and approved the use, at the state's discretion, of either the methodology explained in the *Physical Collocation Order*[7] or the *Open Network Architecture* (ONA) *Order*[8] Li addition, the PSC noted that the FCC relied on its prior orders and precedent when holding that payphone rates must be reduced by the SLC, and that usage charges were subject to the NST. Moreover, the PSC observed that the FCC noted that inclusion of certain retail costs in direct costs had never been precluded.

In its order, the PSC also: reaffirmed the holding in its March 9, 1999, order that required Verizon's payphone rates to be subjected to the NST; found that, with the exception of the EULC, SBC and Verizon demonstrated that their IPP rates complied with the NST, and that it was authorized to compare business

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[7] *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 930162, Second Report and Order, FCC 97-208, 12 FCC Red 18730 (1997).

[8] *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, FCC Order 93-532, 9 FCC Red 440 (1993).

line rates with IPP rates as one factor in determining whether the companies' IPP rates complied with the NST; rejected the MPTA's argument that the LECs should be required to use the UNE method for determining whether their IPP rates complied with the NST, noting that the FCC stated in the *Wisconsin Order* that LECs had three options for use in reaching that determination; rejected the MPTA's assertion that SBC's analysis of its IPP rates relied on cost studies that had been rejected in previous proceedings, and that SBC understated its cos' to provide payphone service because the costs on which SBC relied did not match those filed pursuant to the 1999 order; found that SBC was required to account for the intrastate EULC, a non-cost-based charge, in determining whether its IPP rates comply with the NST, and that with this adjustment, SBC's IPP rates complied with the NST; rejected the MPTA's assertion that Verizon's proposed overhead allocation methodology was inconsistent with the ONA/ARMIS[9] cost methodology for determining whether its IPP rates complied with the NST, but that Verizon erroneously ignored the end user subscriber line charge (EUSLC) in analyzing its coin line rates, and that with that correction, Verizon's IPP rates would comply with the NST; and that to the extent that SBC and Verizon had charged IPP rates in excess of the ceiling established by the NST, the companies' rates were unlawful, and their customers were entitled to refunds but not attorney fees.

In an order entered on February 10, 2005, the PSC denied the MPTA's petition for rehearing. The PSC held, inter alia, that to the extent that SBC and Verizon were required to issue refunds, only those 62

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[9] ARMIS stands for Automated Reporting Management Information System, which is a federally mandated reporting system.

members of the MPTA named in the MPTA's complaint were entitled to receive refunds.

II. Standard of Review

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney Gen v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney Gen v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give great weight to any reasonable

construction of a regulatory scheme that the PSC is empowered to administer, *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998), but we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. Analysis

A. Application of the NST to Usage Sensitive Services

The MPTA argues that the PSC failed to properly apply the NST to the usage sensitive service rates charged by SBC and Verizon.[10] Neither SBC nor Verizon provided any evidence to support their usage sensitive services in their May 1997 compliance filings; therefore, the MPTA concludes, the PSC could not find that the usage sensitive service rates charged by SBC or Verizon complied with the NST. See MCL 24.285; *Attorney Gen v Public Service Comm*, 206 Mich App 290, 295; 520 NW2d 636 (1994).

The MPTA also asserts that the PSC erred in finding that it was authorized to compare overhead

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[10] An IPP pays an LEC such as SBC or Verizon a flat monthly fee for the use of a payphone line itself, plus an amount for each call made from the payphone. This amount is known as the "usage sensitive service" rate element. The NST requires an LEC to price network services at the direct cost of the service, plus a reasonable overhead allocation. An LEC is not entitled to recover "more than a reasonable portion" of its overhead costs. See 47 CFR § 61.49(g)(2).

allocation rates charged by LECs for business lines with overhead allocation rates charged for payphone lines to determine if the payphone line rates complied with the NST. The FCC rejected reliance on business line rates as a comparison to support payphone line rates. *Wisconsin Order*, ¶ 55. The PSC cannot impose a state requirement that is inconsistent with the FCC's regulations. 47 USC 276(c).

We disagree. The NST is a forward-looking, cost-based test that establishes the direct cost of providing a new service as a price floor, and then adds a reasonable amount of overhead to compute the overall price of the new service. The NST is, by its nature, flexible, and does not require the use of a single method by which to calculate the cost of a service. *Wisconsin Order*, ¶ 58. On remand, the PSC was charged with reevaluating its earlier decision to ensure that the intrastate payphone line rates charged by SBC and Verizon complied with the NST and the *Wisconsin Order*. The PSC concluded that, with minor exceptions, the rates charged by SBC and Verizon adhered to the NST.

The PSC correctly found that, with the exception of the failure to account for the EUCL charge, SBC's IPP rates complied with the NST. The PSC properly relied on the FCC's statement that the NST is flexible to reject the MPTA's assertion that SBC should be required to use the UNE methodology to calculate overhead allocations when establishing rates for IPP services. Furthermore, the PSC's finding the SBC's application of the NST to its usage sensitive services was appropriate was supported by the requisite evidence, and we defer to its administrative expertise. *Public Service Comm No 2, supra* at 88.

Moreover, the PSC did not err by comparing SBC's IPP rates to SBC's business line rates. The FCC did not preclude such a comparison in the *Wisconsin Order,* but rather stated that such a comparison could not serve as the sole basis for approving IPP line rates pursuant to the NST. The PSC did not rely on this comparison as its sole basis for approving SBC's IPP rates, but instead used the comparison as merely one factor in its analysis. The removal of business line rates from regulation by 2005 PA 235 does not affect the validity of the PSC's comparison because the comparison was not based on the fact of regulation.

Similarly, the PSC correctly found that Verizon applied the NST to its usage sensitive rates in an appropriate manner, with the exception of Verizon's failure to take into account the EUSLC in analyzing the coin line rate. Verizon used the ONA/ARMIS method of demonstrating compliance with the NST, as permitted by the *Wisconsin Order.* Verizon's calculation of the direct costs associated with a COCOT line included usage. The PSC's acceptance of this method of calculation on the basis that usage cannot be purchased on a stand-alone basis, and must be analyzed along with access, was reasonable and is entitled to deference. *Champion's Auto Ferry, supra.*

Finally, we reject the MPTA's argument that Verizon improperly relied on TSLRIC figures that did not match those approved in previous cases. The approved figures were not available in May 1997 when Verizon submitted its compliance filings in this matter.

B. Adoption of Verizon's Direct Costs

The MPTA argues that the PSC's order as it pertains to Verizon is unlawful and unreasonable

because the order relies on: (1) a cost study for its coin line service submitted by Verizon after the study had been rejected in an arbitration proceeding between AT & T and then-GTE; and (2) a cost study for its COCOT line service that was rejected in PSC Case No. U-11281.[11]

Moreover, the MPTA contends that Verizon improperly relied on cost studies that used different assumptions for coin line service and COCOT line service, thereby resulting in significantly different costs for the services. The PSC's acceptance of Verizon's studies in this proceeding was arbitrary and capricious. We disagree.

The MPTA's assertion that the PSC should have required Verizon to rely on modified studies approved in another case is groundless in light of the fact that those studies did not exist when Verizon made its compliance filing in May 1997 in this case. Given the lack of evidence to show that Verizon's studies were unreasonable at the time they were conducted, we decline to second-guess the PSC's decision to rely on the studies. *Champion's Auto Ferry, supra.*

Verizon's use of different cost studies for its coin line service and its COCOT line service resulted in differences in the overhead allocations for the services, but does not, in and of itself, demonstrate that Verizon failed to comply with the NST. The NST allows a flexible approach to calculating costs. *Wisconsin Order,* ¶ 58. The PSC's decision to rely on cost studies not shown to have been invalid at the time they were

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[11] In that case, the PSC ordered Verizon to resubmit modified cost studies, and then approved the modified studies.

conducted is entitled to deference. *Public Service Comm No 2, supra* at 88.

C. Uniform Application of the NST

The MPTA argues that the PSC erred by failing to order that the lower rates mandated by the FCC be applied, to all IPPs, and not to only those IPPs named in the complaint. The MPTA asserts that the PSC's decision results in discriminatory rate setting in violation of 47 USC 276(a). We disagree.

The MPTA initiated this case by filing a complaint with the PSC. Under the PSC's rules of practice and procedure, a complaint may be filed by a party "having an interest in the subject matter of the complaint..." 1997 AACS, R 460.17501 (Rule 501). The PSC has consistently determined that an association like the MPTA cannot pursue a complaint in a representative capacity because it has not suffered an injury in fact. Furthermore, absent statutory authority, the PSC could not grant monetary relief to non-parties. *Bolt v Lansing (On Remand)*, 238 Mich App 37, 57-58; 605 NW2d 745 (1999). The PSC's order did not discriminate against IPPs not named in the MPTA's complaint.

D. Application of the NST to Verizon's Rates

Verizon, a non-BOC LEC,[12] argues that the PSC erred by payphone rates were subject to the NST. Verizon contends that this issue must be reexamined in light of the *Wisconsin Order,* which held that the FCC lacked jurisdiction under 47 USC 276 to apply the NST to non-BOC LECs. *Wisconsin Order,* f 42. Furthermore, Verizon claims that MCL 484.2318(2) does not give the PSC explicit authority to expand nonstructural safeguards to non-BOCs. We disagree.

The PSC possesses only that authority granted to it by the Legislature. Authority must be granted by clear and unmistakable language. *Attorney Gen* v *Public Service Comm,* 231 Mich App 76, 78; 585 NW2d 310 (1998).

MCL 484.2318 provides:

> (1) A provider of basic local exchange service shall not discriminate in favor of its or an affiliate's payphone service over similar services offered by another provider.
>
> (2) A provider of payphone service shall comply with all nonstructural safeguards adopted by the federal communications commission for payphone service.

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[12] Verizon was formerly known as GTE North, Inc. Verizon indicates that it did not become a BOC by virtue of GTE's merger with Bell Atlantic Corporation. The term "Bell operating company" does not include an "affiliate of any such company." 47 USC 153.

We hold that the PSC did not err when it concluded that MCL 484.3218 authorized application of the NST to Verizon's payphone rates. Initially, we note that Verizon's assertion that MCL 484.2318 was repealed by 2005 PA 235, and thus no longer supports the PSC's position, is erroneous.[13]

Pursuant to 47 USC 276, the FCC is authorized to apply nonstructural safeguards to BOCs, but has no congressional grant of jurisdiction over non-BOC LEC line rates. *Wisconsin Order*, ¶ 14. However, a state commission, like the PSC, may choose to apply the provisions of the *Wisconsin Order* to non-BOC LECs pursuant to state law. *Id.* at ¶ 3 n 12.

MCL 484.2318(2) requires "[a] provider of payphone service" to "comply with all nonstructural safeguards adopted by the [FCC] for payphone service." The statute does not limit this requirement to BOCs. The PSC has the authority to administer the MTA, and to act in a manner consistent with federal rules and regulations. MCL 484.2201. The PSC's conclusion that MCL 484.2318 grants it the authority to apply nonstructural safeguards, such as the NST, to non-BOCs such as Verizon is reasonable in light of the plain language of MCL 484.2318(2), *Cherry Growers, Inc v Michigan Processing Apple Growers, Inc*, 240 Mich App 153, 166; 610 NW2d 613 (2000), and is entitled to deference. *Public Service Comm No 2, supra* at 88.

E. Retroactive Application of the NST and Refunds

SBC argues that the PSC erred by holding that the *Wisconsin Order* should be given retroactive effect,

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[13] MCL 484.2604 provides that the MTA is repealed effective December 31, 2009, and not December 31, 2005.

and that the IPPs named in the complaint were entitled to refunds back to April 15, 1997, the date by which the FCC required BOCs to comply with the NST. The *Wisconsin Order's* requirement that, "in establishing its cost-based, state tariffed charge for payphone line service, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the federally tariffed SLC," *id.* at ¶ 61, marked a substantive change in the formulation of the NST. The FCC knew or should have known that BOCs had relied on its earlier pronouncements regarding the formulation of the NST; nevertheless, the FCC did not direct that the restructured NST be applied retroactively and that refunds be issued back to April 15, 1997. Furthermore, the PSC's order violates the prohibition against retroactive ratemaking and the filed rate doctrine. We disagree.

An FCC decision that clarifies a confusing or an unsettled area of the law does not change the law. *MCI Telecom, Inc v Michigan Bell Tel Co,* 79 F Supp 2d 768, 801 (ED Mich, 1999). In the *Wisconsin Order,* the FCC clearly stated that it was relying on the 1996 *Payphone Orders* as the bases for its explanation of the NST. *Wisconsin Order,* ¶ 1. In the *First Payphone Order,* the FCC stated that in order to comply with 47 USC 276 and the *Computer III* order, LECs were required to unbundled payphone line services and file tariffs for those services pursuant to the NST. The FCC characterized the *Wisconsin Order* as one designed to "assist" states in the application of the NST to ensure compliance with the *Payphone Orders* and 47 USC 276, *Wisconsin Order,* ¶ 2, and rejected an assertion that the

Wisconsin Order changed the law.[14] Therefore, we find that the PSC's conclusion that the *Wisconsin Order* clarified but did not change the law, and thus could be applied retroactively, was reasonable. *Champion's Auto Ferry, supra.*

Retroactive ratemaking in utility cases is prohibited. *Detroit Edison Co v Public Service Comm,* 416 Mich 510, 523; 331 NW2d 159 (1982). Utility rates are set on the basis of estimates of costs. When the estimates prove inadequate, the previously set rates cannot be changed to correct the error. *Michigan Bell Tel Co v Public Service Comm,* 315 Mich 533, 544-547; 24 NW2d 200 (1946). The only step the PSC can take is to prospectively revise rates in order to better estimate costs. *Detroit Edison Co, supra.* The bar against retroactive ratemaking applies only to rates charged by a utility under a lawful order. The PSC can mandate a refund of monies paid pursuant to rates set under an unlawful order. *In re MCI Telecom Complaint,* 255 Mich App 361, 366; 661 NW2d 611 (2003).

Under the filed rate doctrine, a public utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission." *Montana-Dakota Utilities Co v Northwestern Public Service Co,* 341 US 246, 251; 71 S Ct 692; 95 L Ed 2d 912 (1951); see also *Detroit Edison Co, supra* at 516. However, if a tariff rate is found to be unlawful, the filed rate doctrine is inapplicable, and a refund can be ordered. *In re MCI, supra.*

---

[14] See *In the Matter of Request to Update Default Compensation Rates for Dial Around Calls from Payphones,* 19 FCC Red 15636, *f* 60 (released August 12, 2004).

The PSC did not violate the prohibition against retroactive ratemaking by ordering SBC and Verizon to refund monies to IPPs back to April 15, 1997. In its March 8, 1999, order, the PSC approved the rates proposed by SBC and Verizon for IPP services. However, following the issuance of the *Wisconsin Order*, our Supreme Court vacated this Court's 2001 decision that affirmed the PSC's 1999 order, and remanded the matter to the PSC for reconsideration in light of the *Wisconsin Order*. On remand, the PSC concluded that, with the exception of the failure to account for the EUCL charge and the EUSLC, the rates charged by SBC and Verizon for IPP services complied with the NST.

The PSC concluded that to the extent that SBC and Verizon had charged rates for IPP services that exceeded the ceiling established by the NST, those rates were unlawful, and the IPPs were entitled to refunds. The PSC did not change rates to account for shortfalls resulting from a failure to properly estimate costs; thus, its order did not violate the prohibition against retroactive ratemaking. *In re MCI, supra.*

Similarly, the filed rate doctrine was inapplicable under the circumstances. *Id.* The FCC required LECs to adjust their rates charged to IPPs to comply with the NST. This obligation is a nonstructural safeguard, *First Payphone Order*, ¶ 146, with which the LECs are bound to comply. MCL 484.2318(2). The PSC, in its order of March 16, 2004, found that rates charged by SBC and Verizon to IPPs violated the NST. Any tariff approved prior to April 15, 1997, was preempted by the FCC's *Payphone Orders*. SBC and Verizon were

not entitled to rely on any such tariff, and the existence of any such tariff did not preclude the PSC from ordering refunds. Under these circumstances, the PSC's conclusion that those rates did not fully comply with the NST and that the IPPs were entitled to refunds is reasonable and entitled to deference. *Public Service Comm No 2, supra* at 88.

The PSC is authorized to "order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result" of a violation of the MTA. MCL 484.2601. Specifically, MCL 484.260 l(c) authorized the PSC to order that monies collected as a result of SBC and Verizon charging excessive rates to IPPs be refunded.

F. Reduction of IPP Charge for Intrastate EUCL Charge

SBC argues that the PSC exceeded its authority on remand by holding a further contested case hearing, and by determining that SBC was required to account for the intrastate EUCL in its NST analysis. We disagree.

Our Supreme Court remanded the case to the PSC for reconsideration in light of the *Wisconsin Order*. On remand, SBC argued that because the FCC had changed the NST, it should have the opportunity to present evidence based on that change. The PSC concluded that because the remedy sought by the MPTA, i.e., refunds, was significant, due process demanded that the parties have the fullest opportunity possible to present evidence, and on that basis reopened the record. Neither the FCC nor our Supreme

Court precluded the PSC from reopening the record in order to fulfill the remand orders. Moreover, Rule 401 of the PSC's Rules of Practice and Procedure, AACS R 460.17401(1), allows the PSC to reopen proceedings to receive further evidence in order to develop a complete record or to consider changes of fact or law.

Furthermore, the PSC did not exceed its authority by requiring SBC to account for the intrastate EUCL charge in the formulation of its IPP rates. The EUCL charge duplicates certain elements of LECs' direct costs associated with providing access services to IPPs. SBC correctly notes that the FCC did not address the intrastate EUCL charge in the *Wisconsin Order*. However, in that order, the FCC made it clear that various non-cost based charges must be accounted for when determining whether an LEC's IPP rates comply with the NST, including the federally tariffed SLC. The FCC indicated that if such charges were not accounted for, LECs would make a double recovery of some costs, in contravention of federal law. *Wisconsin Order*, ¶¶ 12, 59-61. The PSC reasoned that because it was required by MCL 484.2318(2) to ensure that LECs complied with all nonstructural safeguards, it should require SBC to account for the EUCL charge to prevent double recovery of costs. The PSC's application of its authority under MCL 484.2318(2) is reasonable and entitled to deference. *Champion's Auto Ferry, supra.* The PSC did not exceed its authority on remand by addressing this issue. *In re Complaint of Pelland, supra.*

IV. Conclusion

The PSC's orders granting in part and dismissing in part the MPTA's complaint and denying rehearing are lawful and reasonable, and are supported by the requisite evidence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

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In re: The Illinois Public Telecommunications Association, petitioner, v. Illinois Commerce Commission et al., etc., respondents.
No. 102166

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal, to vacate the order of denial, to stay the appeal, and to refer certain questions to the Federal Communications Commission. Motion Denied.

Order entered by the Court.

Burke, J., took no part.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Mr. Robert M. Dow, Jr.
Mr. John P. Kelliher

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In re: The Illinois Public Telecommunications Association, petitioner, v. Illinois Commerce Commission et al., etc., respondents.
No. 102166

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file additional supplemental authority. Motion Allowed. If you have not already done so, kindly forward twenty copies of additional authority within seven days of the date of entry of the order. Please prepare a cover sheet for each copy of the additional authority. The cover sheet should contain Supreme Court number, title of the case and party designations, your name and address, and the heading 'Additional Authority.'

Order entered by Justice Freeman.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Mr. Robert M. Dow, Jr.
Mr. John P. Kelliher

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In re: The Illinois Public Telecommunications Association, petitioner, v. Illinois Commerce Commission et al., etc., respondents.
No. 102166

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file a supplement to its motion to reconsider the order denying the petition for leave to appeal, to vacate the order of denial, to stay the appeal, and to refer certain questions to the Federal Communications Commission. Motion Allowed.

Order entered by Justice Fitzgerald.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Mr. Robert M. Dow, Jr.
Mr. John P. Kelliher

SUPREME COURT OF ILLINOIS
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May 24, 2006

Mr. Michael W. Ward
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No. 102166: The Illinois Public Telecommunications Association, petitioner, v. Illinois Commerce Commission et al., etc., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 15, 2006.

47 U.S.C.A. § 276.

(a) Nondiscrimination safeguards. After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations.

(1) Contents of regulations
In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

* * *

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

* * *

(c) State preemption.
To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. §153. Definitions.

For the purposes of this chapter, unless the context otherwise requires—

* * *

(4) Bell operating company. The term "Bell operating company"—

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New

Jersey Bell Telephone Company, New York Telephone Company, US West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

***Payphone Association Petition Order*, pp. 114a - 115a, 117a – 118a, 153a – 154a (Illinois Bell Supplemental Appendix, Illinois Appellate Court Brief, Tab D).**

On May 8, 1997, the Illinois Public Telecommunications Association (the "IPTA") filed a verified petition requesting that the Illinois Commerce Commission ("Commission") initiate an investigation to determine whether the Illinois local exchange carriers' tariffs for payphone exchange services comply with the requirements of Section 276 of the Telecommunications Act of 1996, 47 U.S.C. §276 (the "FCA"), and the Federal Communications Commission's ("FCC") orders in CC Docket 96-128. . .

On June 17, 1997, the IPTA filed an amended petition. The amended petition limited the requested investigation to the tariffs for payphone exchange services filed by Illinois Bell Telephone Company, d/b/a Ameritech Illinois ("Ameritech"), GTE North Incorporated and GTE South Incorporated ("GTE"), Central Telephone Company of Illinois ("Centel"), and Illinois Consolidated Telephone Company ("ICTC"), hereinafter collectively referred to as "the LECs." The amended petition requested that the Commission investigate whether the LECs' tariffs for payphone exchange services comply with the requirements of Section 276 of the FCA, the FCC's orders in CC Docket No. 96-128 . . .

II. IPTA REQUEST FOR INVESTIGATION

The IPTA seeks an investigation on the following three issues.

(1) Whether the LECs provide network services to payphone providers at a price that complies with the federally-mandated "New Services Test" (47 C.F.R. §61.49(g)(2)), which requires that such services be priced at the long-run service incremental cost ("LRSIC") plus a reasonable allocation of overhead. The investigation would require the Commission to determine the cost-based price under the New Services Test for each network service provided to payphone providers and the amount of refunds, if any, owed to payphone providers who purchased network services from the LEC at rates which were not cost-based. . . .

XII FINDINGS AND ORDERING PARAGRAPHS

The Commission having reviewed the entire record and being fully apprised of the premises, is of the opinion and finds that: . . .

(3) the following three matters proffered by the Illinois Public Telephone (sic) Association warrant investigation: LEC compliance with the pricing provisions of the New Services Test in provisioning pay telephone service . . .

IT IS THEREFORE ORDERED that an investigation should be opened by the Commission on its own motion to explore the matters referred to in finding (3) above.

Illinois Public Telecommunications Association, Petition for Leave to Appeal to the Illinois Supreme Court, Points Relied On For Reversal, p. 2.

Where federal law required that no later than April 15, 1997 (Illinois Bell) and Verizon establish cost-based rates for telephone services provided to payphone providers, and expressly preempted all inconsistent state requirements, the Appellate Court erred in holding that the prior orders of the Illinois Commerce Commission setting non-cost-based rates remained in effect and prohibited reparations of the excessive charges under the filed rate doctrine.

Where the FCC required (Illinois Bell) and Verizon to have cost-based rates to payphone providers actually in effect as a precondition to receiving federal dial around compensation, and the purpose of this requirement was expressly to ensure the implementation of the cost-based rate requirement, payphone providers have standing to assert the FCC's dial around compensation enforcement mechanism established to secure their rights.

List of State Public Utility Commissions Ordering Refunds

1. *Michigan Pay Telephone Association v. Ameritech Michigan and GTE North Incorporated,* Michigan Public Service Commission, Case No. U-11756, Opinion and Order (March 16, 2004);

2. *All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service As Required by Federal Communications Commission (FCC) Docket 96-128,* Tennessee Regulatory Authority, Docket No. 97-00409, Interim Order (February 1, 2001), Final Order (May 21, 2002);

3. *Deregulation of Local Exchange Companies Payphone Service,* Kentucky Public Service Commission, Case No. 361, Order (January 5, 1999);

4. *Request of BellSouth Telecommunications, Inc. for Approval of Revisions to its General Subscriber Service Tariff and Access Service Tariff to Comply with the FCC's Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* Public Service Commission of South Carolina, Docket No. 97-124-C, Order No. 1999-285 (April 19, 1999);

5. *Request of the Indiana Payphone Association for the Commission to Conduct an Investigation of Local Exchange Company Pay Telephone Tariffs for Compliance with Federal Regulations, and to Hold Such Tariffs in Abeyance Pending Completion of Such Proceeding,* Indiana Utility Regulatory Commission, Cause No. 40830, Order (September 6, 2000).

List of State Public Utility Commissions Orders Approving Refund Agreements

1. *BellSouth Telecommunications, Ex Parte. Consideration of Payphone Tariff Filed by BellSouth Telecommunications, Inc. on May 19, 1997 and Determination Whether the New Tariff Meets the Provisions of the Telecommunications Act of 1996 and Associated FCC Orders,* Louisiana Public Service Commission, Order No. U-22632 (August 3, 2001);

2. *Central Atlantic Payphone Association v. Bell Atlantic - Pennsylvania, Inc.,* Pennsylvania Public Utility Commission, Docket No. R-0097386700001, Order (September 30, 1998).

List of Cases Denying Refunds

1. *Independent Payphone Association of New York v. Public Service Commission of New York,* 774 N.Y.S.2d 197 (2004);

2. *In Re: Complaint of the Southern Public Communication Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to its Rates for Payphone Line Access, Usage, and Features,* Mississippi Public Service Commission, Docket No. 2003-AD-927, Order (September 1, 2004);

3. In *Re: Petition for Expedited Review of BellSouth Telecommunications, Inc.'s Intrastate Tariffs for Pay Telephone Access Services (PTAS) Rate with Respect to Rates for Payphone Line Access, Usage, and Features, by Florida Public Telecommunications Association,* Florida Public Service Commission, Docket No. 030300-TP, Order (October 7, 2004);

4. *Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) implementation of Section 276 of the telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the Rate Policy for Operator Service Providers,* Massachusetts Department of Telecommunications and Energy, D.P.U./D.T.E 97-88/97-18 (Phase II), Order (June 23, 2004).

List of Petitions Before the FCC for Declaratory Ruling Regarding Refunds, In Addition to the Illinois Association FCC Petition

1. *Petition of the Independent Payphone Association of New York, Inc. to Pre-empt Determinations of the State of New York Refusing to Implement the Commission's Payphone Orders, and For a Declaratory Ruling,* CC Docket No. 96-128, filed December 29, 2004;

2. *The Southern Public Communication Association's Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders,* CC Docket 96-128, filed October 5, 2005;

3. *Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption Concerning the Refund of Payphone Line Rate Charges,* CC Docket 96-128, filed January 31, 2006.

OPPOSITION BRIEF

No. 06-543

In the Supreme Court of the United States

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION, ILLINOIS BELL TELEPHONE COMPANY D/B/A SBC ILLINOIS, VERIZON NORTH, INC. AND VERIZON SOUTH, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Appellate Court, First District

BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a/ SBC ILLINOIS IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Illinois Appellate Court's application of well settled filed rate principles to the mixed state-federal scheme for payphone rates under the Telecommunications Act of 1996, pursuant to which the Appellate Court determined that Illinois Bell had an obligation to adhere to its pre-existing Commission-approved rates unless and until those rates were stayed, suspended, or set aside by a further Commission order or court ruling.

RULE 29.6 STATEMENT

Illinois Bell Telephone Company (AT&T Illinois, formerly SBC Illinois or Ameritech Illinois) is a wholly-owned subsidiary of AT&T Teleholdings, Inc. (formerly SBC Teleholdings, Inc. or Ameritech Corporation). In turn, AT&T Teleholdings, Inc. is a wholly-owned subsidiary of AT&T Inc. (formerly SBC Communications Inc.), a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held corporation owns 10% or more of the stock of AT&T Inc.

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BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a SBC ILLINOIS IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court is unpublished and is reproduced at Pet. App. 1a-15a. The order of the Illinois Commerce Commission that was affirmed by the Appellate Court's decision is unpublished and is reproduced at Pet. App. 16a-113a.

JURISDICTION

The Illinois Appellate Court issued its decision in an unpublished order entered on November 23, 2005. A timely petition for rehearing was filed on December 14, 2005. The Appellate Court denied the petition for rehearing on January 13, 2006. A timely petition for leave to appeal to the Supreme Court of Illinois was filed on February 17, 2006. The Illinois Supreme Court entered an order denying the petition for leave to appeal on May 24, 2006. A "Motion for Leave to File a Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission" was filed on June 14, 2006. On July 20, 2006, the Illinois Supreme Court entered an order denying the June 14 "Motion for Leave to File a Motion to Reconsider." The petition for writ of certiorari was filed on October 18, 2006.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257. However, as explained below (at 6-8, *infra*), because the petition for writ of certiorari was not filed within 90 days after the entry of the order of the Illinois Supreme Court denying discretionary review — *i.e.*, by August 23, 2006 — the petition is jurisdictionally out of time. See 28 U.S.C. § 2101(c); SUP. CT. R. 13.1.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in Petitioner's Appendix.

STATEMENT

A. The Parties and the Nature of the Case.

This case involves the tariffed rates that Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC Illinois") and other incumbent local exchange carriers ("ILECs") charge when they provide telecommunications services to unaffiliated providers of payphone services. The Illinois Commerce Commission ("ICC" or "Commission") reviews and approves the ILECs' rates for those services, just as it reviews the ILECs' other tariffed rates. Petitioner, the Illinois Public Telecommunications Association ("IPTA"), is a trade association that represents the interests of independent payphone providers ("IPPs") in state and federal legislative and regulatory matters.

B. SBC Illinois' Commission Approved Rates.

In 1985 and again in 1995, the Commission reviewed and approved SBC Illinois' IPP rates, which were based on retail business rates. Pet. App. 3a; 27a-29a. The Commission adopted the rates at issue in this case in 1995. The Commission's 1995 Order terminated a Commission proceeding that SBC Illinois and the IPTA litigated for more than seven years and concluded with a Stipulation, by which the IPTA and SBC Illinois agreed to resolve the disputed IPP rate issues "through June 30, 2005," and which the Commission reviewed, revised, and incorporated into its final decision. *Id.* at 28a-29a.

C. The 1996 Act and the "New Services" Test.

In 1996, Congress enacted the federal Telecommunications Act of 1996 (the "1996 Act"). Section 276 of the 1996 Act addresses issues relating to the payphone industry. It provides that a local exchange carrier (like SBC Illinois) may not (i) "subsidize its payphone service directly or indirectly

from its telephone exchange * * * or exchange access operations" or (ii) "discriminate in favor of its payphone service." 47 U.S.C. § 276(a).

While the Act does not establish specific standards to govern IPP rates, to ensure that ILECs would not discriminate in their provision of network services to IPPs, the Federal Communications Commission ("FCC") imposed a so-called "new services test" on IPP rates. The FCC ordered ILECs to file new IPP service tariffs with their state commissions, but only if the ILECs' payphone services were not already tariffed. The FCC considered, but rejected, an IPP proposal to require ILECs with existing, effective state tariffs to file new ones. Order on Reconsideration, *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, ¶¶ 162-63, 11 F.C.C.R. 21,233, 21,307-21,309 (Nov. 8, 1996) ("*Payphone Reconsideration Order*"). Instead, the FCC required ILECs that already had effective tariffs on file (like SBC Illinois) to provide their state commissions with documentation demonstrating compliance with the FCC's pricing policy. *Id.* ¶ 163, 11 F.C.C.R. at 21,308. In compliance with the FCC's directive, on May 15, 1997, SBC Illinois filed with the Commission the additional cost documentation required by the FCC. Pet. App. 29a.

D. The ICC's Underlying Order.

The ICC commenced an investigation to determine whether SBC Illinois' and Verizon's payphone rates complied with the new services test. Pet. App. 21a-22a. On November 12, 2003, the ICC issued an order in which it found that neither SBC Illinois nor Verizon had satisfied the new services test and ordered reductions in both companies' IPP rates. See Pet. App. 59a-93a. However, the Commission rejected the IPTA's claim for refunds. First, the Commission found that the refund claim was barred by the filed rate doctrine. The Commission explained that "[b]oth the United States Supreme Court and the Illinois Supreme Court have

ruled that rates that have been reviewed and approved by the appropriate regulatory agency cannot later be subject to refund." *Id.* at 102a. Applying the controlling law to the facts before it, the Commission found that refunds were inappropriate, because the Commission had approved SBC Illinois' IPP rates at least twice previously. *Id.* at 103a. The Commission also noted that (i) the IPTA had not properly perfected a claim for refunds by filing a complaint under 220 ILCS 5/9-252 challenging the continued application of the existing rates and (ii) the IPTA had agreed to the existing rates in the Stipulation that led to the Commission's 1995 Order and had benefited substantially from its bargain. *Id.*

E. The Appellate Court's Decision.

The Appellate Court affirmed the ICC's decision in its entirety in an unpublished order issued on November 23, 2005. Pet. App. 7a-15a. Following a detailed discussion of the "controlling" filed rate doctrine principles adopted by the Illinois Supreme Court in *Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205 (1954), in which the Illinois High Court tracked this Court's reasoning in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932), the Appellate Court held that "[s]ince the rates in question were the subject of regulatory approval, SBC Illinois and Verizon were entitled to rely on those rates for as long as they were in effect" and that "the subsequent reduction in those rates in November 2003 affords no right of action for a refund of the difference between the old and new rates." Pet. App. 9a-10a.

The Appellate Court found "unavailing" the IPTA's argument that Section 276 of the 1996 Act and the FCC's implementing rules required a different result. Pet. App. 10a. As the Court explained, "Section 276 did not state whether or not the rates approved by the ICC were in compliance with the FCC's regulations, nor did section 276 provide that the FCC would make the determination as to whether the rates approved by the ICC were in compliance." *Id.* at 10a-11a.

Rather, "as conceded by the IPTA, the FCC looked to state regulatory commissions to ensure compliance with the FCC's regulations." *Id.* at 11a. In other words, "the existing rates remained in effect until the ICC determined whether or not they complied with the FCC's regulations." *Id.*[1]

On December 14, 2005, the IPTA filed a Petition for Rehearing in the Appellate Court. The Court denied that Petition on January 13, 2006.

F. The Illinois Supreme Court Proceedings.

On February 17, 2006, the IPTA filed a timely petition for leave to appeal to the Supreme Court of Illinois. On May 24, 2006, the Supreme Court entered an Order denying the IPTA's petition. Pet. App. 190a. On June 14, 2006, the IPTA filed a document styled "Motion for Leave to File a Motion to Reconsider the Order Denying the Petition for Leave to Appeal, to Vacate the Order of Denial, to Stay the Appeal, and to Refer Certain Questions to the Federal Communications Commission." On July 20, 2006, the Court issued an Order denying the IPTA's June 14 "Motion for Leave to File a Motion to Reconsider." *Id.* at 184a-185a.

REASONS FOR DENYING THE PETITION

As explained in greater detail below, the IPTA's petition presents no basis — much less a compelling reason — for

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[1] The Appellate Court also found that the IPTA lacked standing to raise any argument concerning dial-around compensation that SBC Illinois received from interexchange carriers. Pet. App. 14a-15a. Citing *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999), the Appellate Court noted that "[t]he IPTA (and its members) did not pay the dial around compensation; those payments were made by interexchanging carriers who are not parties to this appeal." *Id.* at 14a. Accordingly, the Court held that the IPTA lacked standing because it (and its members) "suffered no injury that would be redressed by the return of the dial around compensation to the interexchanging carriers." *Id.* at 14a-15a.

review in this Court. In fact, there are numerous reasons why this case is a particularly poor candidate for certiorari:

- To begin with, the petition was not filed within 90 days of the entry of the Illinois Supreme Court's order denying discretionary review of the Illinois Appellate Court's decision and thus is jurisdictionally out of time.
- In addition, none of the criteria set forth in Rule 10 is satisfied; the decision below is not in conflict with any decision of a United States Court of Appeals, a state court of last resort, or this Court.
- Moreover, even if a conflict existed, this case would be a poor vehicle for resolving it because there are two alternative bases for affirmance of the underlying Commission Order.
- Finally, the decision below is correct; the Appellate Court properly applied the filed rate doctrine and did so consistently with the 1996 Act.

For all of these reasons, SBC Illinois respectfully requests that this Court deny the IPTA's petition.

I. The Petition for Certiorari Was Not Timely Filed.

Supreme Court Rule 13.1 provides that "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review." Rule 13.1 tracks 28 U.S.C. § 2101(c), pursuant to which Congress has dictated that a petition for certiorari in a civil case must be filed within 90 days of the entry of the judgment below.

Under this Court's precedents, "[t]his 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). "No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained." R. Stern, E. Gressman, S.

Shapiro & K. Geller, SUPREME COURT PRACTICE 349 (8th ed. 2002). The reason for this Court's strict adherence to the rule is straightforward: the Court has "no authority to extend the period for filing except as Congress permits." *Jenkins*, 495 U.S. at 45. It therefore should come as no surprise that where the untimeliness of a petition is clear on its face, this Court's Rules state that "[t]he Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time." SUP. CT. R. 13.2 (citing 28 U.S.C. § 2101(c)).

It has been this Court's historic practice to treat timely petitions for rehearing timely "as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Jenkins*, 495 U.S. at 45. That practice now is reflected in Supreme Court Rule 13.3. At the same time, it is a "well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on the merits the time to appeal from the original order is not extended." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150 (1942) (citing *Bernards v. Johnson*, 314 U.S. 19, 31 (1941); *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940)).

Under the "well-established rule" recognized in this Court's decisions, the time to appeal from the Illinois Supreme Court's May 24, 2006 denial of the IPTA's petition for leave to appeal was not extended by the filing of the IPTA's June 14 motion. Neither the Illinois Supreme Court Rule governing petitions for leave to appeal (ILL. S. CT. R. 315) nor the Rule governing petitions for rehearing (ILL. S. CT. R. 367) authorizes the filing of a petition for rehearing (or reconsideration) of the denial of a petition for leave to appeal. For that reason, instead of simply filing a petition for rehearing of the Illinois Supreme Court's May 24 denial of the IPTA's petition for leave to appeal, the IPTA filed a document styled "Motion for *Leave to File* a Motion to Reconsider" the Court's May 24 order. (Emphasis added.) In other words, the IPTA's June 14 submission was not itself a

motion for rehearing or reconsideration and on its face contemplated the filing of a further motion in which the IPTA would seek reconsideration in the event that its initial motion were granted. In denying the June 14 motion (Pet. App. 184a-185a), the Court plainly did not consider a motion for rehearing or reconsideration on the merits.

The Illinois Supreme Court's disposition of the IPTA's "Motion for Leave to File a Motion" fits squarely within the "well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended." *Pfister*, 317 U.S. at 150; *Bernards*, 314 U.S. at 31; *Bowman*, 311 U.S. at 266. Indeed, denial of the IPTA's Petition in this Court as jurisdictionally out of time follows *a fortiori* from that rule, because the Illinois Supreme Court not only declined to "entertain[] or consider[]" a motion for rehearing, but in fact refused even to permit the IPTA to *file* such a motion in the first place.[2] Because the IPTA's petition for certiorari was filed more than 140 days after the denial of its petition for leave to appeal to the Illinois Supreme Court — and thus not within the 90-day period allowed by statute and this Court's Rules — the petition must be dismissed as jurisdictionally out of time. *Jenkins*, 495 U.S. at 45; see also *Allegrucci v. United States*, 372 U.S. 954 (1963) (denying petition for writ of certiorari "for the reason that the petition was not timely filed"); *Department of Banking v. Pink*, 317 U.S. 264, 266-67 (1942) ("we must deny the petition for certiorari on the ground that it was not filed within the time provided by law").

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[2] Petitioner's statements that the Illinois Supreme Court denied a "motion to reconsider" (Pet. 1, 14) thus are inaccurate.

II. There is No Compelling Reason for Supreme Court Review.

A. There is No Conflict with a Decision of a United States Court of Appeals.

The IPTA points to a single decision of a United States court of appeals that the IPTA contends is in conflict with the Illinois Appellate Court's Order in this case. See Pet. 2, 14, 25. But the Ninth Circuit decision in *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006), is inapposite. In that case, the court considered the application of the filed rate doctrine in the context of a Federal Communications Commission ("FCC") Order that is not implicated in any way in the matter before this Court. *Davel* thus is irrelevant to this Court's consideration of the IPTA's Petition.

In *Davel*, the filed rate issue addressed by the court concerned the scope and application of the FCC's *Limited Waiver Order*[3] and a "reimbursement requirement" set forth in that *Order*. As the ICC explained, the *Limited Waiver Order* "grant[ed] limited waivers of the time limit for filing intrastate tariffs for IPP rates, and ma[de] tariffs filed pursuant to the waiver subject to certain refund obligations." Pet. App. 104a. The FCC made clear that the waiver would extend the filing date for *new* tariffs for only a "brief duration" and that "*[i]f* a local exchange carrier relied on the waiver, it was required to reimburse its customers 'from April 15, 1997 in situations where the newly [filed] rates, when effective, are lower than the existing [filed] rates.'" *Davel*, 460 F.3d at 1082-83 (emphasis added) (quoting *Limited Waiver Order* ¶¶ 2, 20-21, 23, 25). In view of the explicit quid pro quo (waiver of the deadline for *new* tariffs in exchange for refunds during the brief "waiver period"), the Ninth Circuit

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[3] Order, *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 F.C.C.R. 21,370 (Apr. 15, 1997) ("*Limited Waiver Order*").

concluded that the *Limited Waiver Order* constituted "a departure from a filed rate * * * during the waiver period for certain services obtained during that time" and held that "the filed-rate doctrine does not stand as a bar to construing the reach of and then enforcing *the Waiver Order's reimbursement requirement.*" *Davel*, 460 F.3d at 1085-86 (emphasis added).

That holding has no bearing on this case, however, because the FCC made crystal clear that the refund obligation in the *Limited Waiver Order* applied only to new tariffs. *Limited Waiver Order* ¶¶ 1, 2, 20, 25. Here, it is undisputed (and indisputable) that SBC Illinois did not file any new tariffs. See Pet. App. 29a ("Because SBC had already tariffed its payphone services, and because those tariffs had already been reviewed and found reasonable by the Commission, SBC did not file any new tariffs with the Commission in compliance with the *Payphone Classification Order*"). Accordingly, there is no basis for concluding that SBC Illinois is subject to any reimbursement obligation imposed under the *Limited Waiver Order* that the Ninth Circuit construed in *Davel*.

B. There is No Conflict with a Decision of a State Court of Last Resort.

The IPTA also argues that the decision below is worthy of this Court's review because it purportedly conflicts with the results obtained in seven state commission proceedings listed in the IPTA's Appendix (see Pet. App. 197a-198a) in which refunds were ordered or approved as part of the settlement of a case. Significantly, none of the matters cited by the IPTA is a decision of a state court of last resort. Indeed, only one — an unpublished, per curium decision of the Michigan Court of Appeals — is a decision of any court at all.[4] The others are state public utility commission orders.

[4] That case was resolved largely in SBC Michigan's favor, both in the Michigan Commission and in the Court of Appeals. See Pet.

And, as SBC Illinois demonstrated in the courts below, the other state public utility commission orders on which the IPTA relies are readily distinguishable from this case.[5] In short, none of those decisions supports the notion that the decision below squarely conflicts with any other decision, much less a decision of a state court of last resort.

C. There Is No Conflict with a Decision of This Court.

The IPTA's suggestion that the Illinois Appellate Court's decision somehow conflicts with this Court's filed tariff jurisprudence is puzzling. In support of that suggestion, the IPTA points only to two of this Court's decisions, *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry. Co.*,

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App. 172a ("The PSC correctly found that, with the exception of the failure to account for the EUCL charge, SBC's IPP rates complied with the NST"). And to the extent that the Michigan intermediate appellate court's determination differs from the Illinois Appellate Court's on the question of whether tariffs approved prior to April 1997 are preempted by the FCC's *Payphone Orders* (see *id.* at 180a), the Michigan decision remains open to reconsideration and revision in the Michigan court system. In fact, both SBC Michigan and the Michigan Pay Telephone Association recently filed applications for leave to appeal the Michigan Court of Appeals decision to the Michigan Supreme Court (Nos. 132431 & 132436, filed Nov. 9, 2006).

[5] The decisions in Tennessee, Kentucky, South Carolina and Indiana (Pet. App. 197a-198a) addressed new tariff filings. The tariffs at issue in Tennessee and South Carolina were filed pursuant to the *Limited Waiver Order*. And those in Kentucky and Indiana had been allowed to go into effect on an interim basis only, subject to further review and refunds. Those orders have no relevance where, as here, the state commission previously reviewed and approved the IPP service rates and SBC Illinois did not file a new tariff. Finally, the Louisiana and Pennsylvania decisions (*Id.* at 198a) simply approved settlements, and thus did not address refund issues on the merits.

284 U.S. 370 (1932), and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). But nothing that the Appellate Court said or did in this case contradicts either of those decisions in any respect. To the contrary, the Appellate Court expressly followed the filed tariff principles set out in the seminal Illinois filed tariff case, *Mandel Bros. Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205 (1954), in which the Illinois Supreme Court "adopted the reasoning" of this Court's decision in *Arizona Grocery*.

In *Arizona Grocery*, this Court held that once a regulator has reviewed and approved a rate, that rate becomes "by virtue of the Commission's order also a lawful — that is, a reasonable — rate." 284 U.S. at 387. The regulator cannot change its decision retroactively. "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Id.* at 389. In *Mandel Bros.*, the Supreme Court of Illinois, following *Arizona Grocery*, similarly concluded "that the rate approved by the Commerce Commission as just and reasonable was the rate which the utility was required to charge so long as the order of the commission remained in effect. It cannot therefore be said that in charging that rate the utility charged an excessive rate which gave rise to a claim for reparations." 2 Ill. 2d at 211-12. And the Appellate Court expressly applied those principles in resolving this case. Pet. App. 9a-10a.

The IPTA's citation to *Maislin Industries* likewise fails to support its argument. In that case, this Court stressed that "Congress must be presumed to have been fully cognizant" of judicial construction of statutes incorporating the filed rate doctrine and upholding the continued applicability of the doctrine. 490 U.S. at 135. Application of that rule here shows why the IPTA's argument fails. Because "Congress did not see fit to change" the filed rate doctrine (*id.*) when it enacted Section 276, but instead left the matter to the states under their own filed rate jurisprudence, the terms of SBC's existing tariffs remained in effect and constituted the legal,

lawful, and reasonable rates that SBC Illinois was obligated to charge under state law (which, as noted above, tracks federal law) unless and until the Commission acted to invalidate those terms (as it did in 2003).

D. There Are Alternative Grounds for Affirmance of the ICC's Order.

Finally, even if the IPTA could demonstrate a conflict between the decision below and any decision of a United States court of appeals, the highest court of a state, or this Court's own decisions — which it clearly cannot — this case would not present a good vehicle for resolving any such conflict because there are at least two alternative grounds for affirmance of the ICC Order that were not reached by Appellate Court.

First, as the Commission held, the IPTA failed to perfect its claim for refunds by filing a complaint, as required under 220 ILCS 5/9-252. See Pet. App. 103a ("Significantly, from the time that the FCC established its NST through today, there has been no complaint to formally challenge the rates at issue in this case"). The IPTA initiated this proceeding by filing a petition for an investigation under 220 ILCS 5/9-250, which confers general rate authority applicable in both complaint and investigation proceedings, permits only forward-looking rate changes. See 220 ILCS 5/9-250 ("the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided"). In commencing the proceedings that gave rise to this appeal, the Commission specifically stated it was opening an "*investigation.*" Pet. App. 22a (emphasis added). While the Commission may set rates prospectively in both complaint cases and investiga-

tions, under state law it may award refunds, if lawfully due, only in complaint cases.[6]

Second, as a result of the Commission's approval of the parties' Stipulation in its 1995 Order and the IPTA's subsequent enjoyment of the benefits of that Stipulation and Order from 1995 through 2003, the IPTA's refund claim is barred by waiver and estoppel. As the Commission explained:

> [T]he IPTA has benefited from the [1995] Payphone order during the eight years it has been in effect. SBC points out that the IPTA has enjoyed deep discounts on IPP usage rates and other advantages conferred by our Order incorporating the 1995 Settlement. This severely undercuts the IPTA refund argument.

Pet. App. 103a. That conclusion is both legally correct and eminently fair. Under Illinois law and policy, "[s]ettlement agreements are to be encouraged and given full force and effect." *Kazale v. Flowers*, 185 Ill. App. 3d 224, 227 (2d Dist. 1989). And the Illinois Supreme Court has held that "[a] party who has accepted and retained the advantages of an order cannot be heard to attack the validity or propriety of conditions upon which its right to such advantages was expressly predicated." *Zweifel Mfg. Corp. v. City of Peoria*, 11 Ill. 2d 489, 493-94 (1957).

E. The Appellate Court's Decision Is Correct.

Finally, the IPTA's petition should be denied because the Appellate Court's decision correctly applied well settled

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[6] The IPTA's decision to pursue this case through a petition for investigation, rather than a complaint, also affected the timing of relief. While the timing of an investigation docket is highly discretionary, a complaint proceeding must be completed within a year of the filing of the complaint, unless both the complainant and the respondent agree to extend the deadline. 220 ILCS 5/10-108. Thus, had the IPTA filed a complaint, it could have obtained a final order from the Commission by May 1998.

filed rate principles and faithfully implemented Section 276 and the FCC's orders implementing the "new services" test.

1. Illinois strictly adheres to the filed rate doctrine. Indeed, the doctrine has been codified in Section 9-240 of the Illinois Public Utilities Act. 220 ILCS 5/9-240. As the Appellate Court correctly explained, in applying the filed rate doctrine, both this Court's and the Illinois Supreme Court's decisions have "distinguished between carrier-made rates (*i.e.*, rates which had become effective without prior regulatory examination and approval) and rates established or approved by a regulatory body." Pet. App. 9a (citing *Mandel Bros.*, 2 Ill. 2d at 209). Under those decisions, a *Commission-approved* rate is "legislative in character and prospective in its operation," and is the legal, lawful, and reasonable rate that a common carrier must charge without deviation "so long as the order of the commission remain[s] in effect." *Mandel Bros.*, 2 Ill. 2d at 210-12; accord *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 387-89 (1932); *Independent Voters of Illinois v. Illinois Commerce Comm'n*, 117 Ill. 2d 90, 97 (1987) (reaffirming the holding and rationale of *Mandel Bros.*). Under *Mandel Bros.*, Commission-approved rates have the force of statutes, and carriers have not only a right, but an obligation, to adhere to such rates unless and until they are stayed, suspended, or set aside by an agency or a court ruling. *Mandel Bros.*, 2 Ill. 2d at 208-12. Furthermore, Commission-approved rates are not subject to retroactive refunds or reparations, even if subsequent changes in the law render the rates subject to change on a prospective basis. *Id.* at 212.

Applying those principles, the ICC correctly determined that SBC Illinois' rates were Commission-approved. In 1985 and 1995, the ICC directed SBC Illinois to file compliance tariffs setting its rates for payphone services based on SBC Illinois' rates for equivalent retail business services. In the most recent of those Orders, the ICC mandated that "Illinois Bell shall offer" to provide its payphone services "at the

above described rates" and "shall file tariffs for the implementation of [the] conclusions reached by the Commission" along with "supporting cost studies." Order, Ill. C.C. Dkt. 88-0412, at 26, 1995 Ill. PUC LEXIS 393, at *54 (ICC June 7, 1995).

Because the rates at issue in this case were Commission-approved, the Appellate Court and the ICC properly rejected the IPTA's attempt to obtain refunds. As the Court and the Commission explained, SBC Illinois not only had a right, but in fact had a legal obligation, to charge the Commission-approved rates until the ICC entered its November 2003 Order setting aside those rates.

2. Unable to mount a plausible challenge to the straightforward application of the filed rate doctrine in this case, the IPTA pins its hopes for review in this Court on the contention that the ICC and the Appellate Court erred in failing to give effect to the FCC's pronouncements implementing the new services test, which the IPTA insists somehow nullified the effectiveness of the rates established in the ICC's 1995 Order. That contention is without merit. In fact, the FCC could not have been clearer that previously tariffed rates remained effective and were, at most, subject to change prospectively in future proceedings conducted by the state commissions.

Congress, when it enacted Section 276, or the FCC, in implementing that Section, could have preempted all existing state law tariffs and required carriers to file new federal tariffs subject to federal review. Either Congress or the FCC could have required all carriers to file new state tariffs and mandated state review of those tariffs within a certain period of time. Or Congress could have modified, limited, or abrogated the filed rate doctrine by saying that all existing tariffs were subject to refund obligations if they were found to have violated the new services test. Neither Congress nor the FCC did any of the above. Instead, the FCC expressly stated that it would "rely on the states," using state procedures and ap-

plying state filed rate doctrines, to determine whether existing state tariffs were preempted because they failed to comply with its new services test. See *Payphone Reconsideration Order* ¶ 163, 11 F.C.C.R. at 21,308; see also *id.* (explaining that "[w]here LECs have already filed intrastate tariffs for [basic payphone line services], states may * * * conclude: 1) that existing tariffs are consistent with the requirements of the [FCC's payphone orders]; and 2) that in such case no further filings are required").

As the ICC explained in its November 2003 Order, "[b]ecause SBC had already tariffed its payphone services, and because those tariffs had already been reviewed and found reasonable by the Commission, SBC did not file any new tariffs with the Commission in compliance with the *Payphone Clarification Order*." Pet. App. 29a. Instead, consistent with the FCC's directive, SBC Illinois supplied additional cost documentation, which the Commission accepted. *Id.* The Commission then commenced a proceeding to investigate whether SBC's existing tariffs complied with the "new services test." *Id.* at 21a-22a.

Because Congress did not address — much less limit or repeal — the filed rate doctrine as to pre-existing tariffs, that doctrine continued to control the legal effect of the rates in SBC Illinois' payphone tariffs during the ICC's investigation. See, *e.g.*, *Maislin Industries*, 497 U.S. at 135 (noting presumption that Congress is "fully cognizant" of the judicial construction of statutes incorporating the filed rate doctrine and upholding the continued applicability of the doctrine where "Congress did not see fit to change it" when enacting new legislation). Thus, unless and until the Commission acted to invalidate the terms of SBC's existing tariffs, those terms remained in effect and constituted the legal, lawful, and reasonable rates. In other words, as both the Appellate Court (Pet. App. 9a-10a) and the ICC (*id.* at 102a-103a) properly held, SBC remained obligated to charge the filed rates reflected in its 1995 compliance tariffs "so long as the

order of the commission" requiring those tariffs "remained in effect" (*Mandel Bros.*, 2 Ill. 2d at 211-12) — which was until November 12, 2003.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION, ILLINOIS BELL TELEPHONE COMPANY d/b/a/ SBC ILLINOIS, VERIZON NORTH, INC. and VERIZON SOUTH, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

Respondent[1] fails to provide any convincing reason to deny the review of the question this case presents. Respondent does not dispute: 1) that Respondent failed to provide cost-based rates for local telephone service to competing payphone service providers by April 15, 1997, as repeatedly ordered by the FCC in implementing 47 U.S.C. §276; or 2) that Respondent falsely certified that it was in compliance with this federal requirement, enabling Respondent to illegally collect hundreds of millions of dollars in compensation. Various actions affecting at least 20[2] states are currently pending regarding the refund issue. Decisions affecting at least 24 states have reached irreconcilable results, with refunds for such violations being permitted in some states (18 states[3]) and denied in other states (6 states[4]).

Illinois maintains the minority position that refunds are barred by the filed rate doctrine. Respondent attempts to avoid this position's direct conflict with the subsequent decision of the Ninth Circuit, *Davel Communications, Inc. v. Qwest Corporation*, 460 F.3d 1075 (2006), by suggesting that the Ninth Circuit's opinion is limited to the application of an FCC waiver. Respondent wholly avoids the Ninth

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[1] Illinois Bell Telephone Company f/k/a SBC Illinois is the sole Respondent filing a Brief in Opposition.

[2] States involved in pending actions include Illinois, New York, Mississippi, Florida, Ohio, Michigan, Wisconsin, Massachusetts, Oregon, and the 11 western states in the *Davel* proceeding.

[3] States in which refunds are available include Michigan, Tennessee, Kentucky, South Carolina, Indiana, Louisiana, Pennsylvania, and the 11 states in *Davel*. *See* Pet. App. 197a-198a (for cases other than *Davel*).

[4] States in which refunds are not provided include Illinois, New York, Massachusetts, Mississippi, Ohio, and Florida. *See* Pet. App. 198a (listing the cases other than Ohio) and *Re Implementation of §276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, 2000 WL 973255 (Ohio P.U.C.).

Circuit's primary finding that the filed rate doctrine simply does not bar enforcement of the very regulatory scheme giving rise to the tariff-filing requirement in issue here. The Ninth Circuit found that to hold otherwise would conflict with the decisions of this Court on the general application of the filed rate doctrine. The Illinois decision, finding that the filed rate doctrine bars enforcement of that regulatory scheme, squarely conflicts with both the decision of the Ninth Circuit and the previous decisions of this Court.

The specific issue of whether refunds are available for violations of the scheme established under 47 U.S.C. §276 is an important question of federal law that has not been, but should be, settled by this Court. It is the culmination of numerous proceedings conducted over the past 11 years, many of which continue today, to first establish, and then seek compliance with, the uniform national regulatory scheme envisioned by Congress. It typically involves millions of dollars in each state that are due to small business providers of payphone services, which revenues the statute recognizes are necessary to achieve Congress' goal of the widespread deployment of payphone services. The Court should act to resolve this question and to ensure that the massive efforts to implement and enforce a uniform national regulatory scheme have not been wasted.

Finally, Respondent's suggestion that the petition for certiorari was not timely filed misstates both law and fact.

I. THE PETITION FOR CERTIORARI WAS TIMELY FILED.

While recognizing that a petition for certiorari is timely when filed within 90 days of a lower court's denial of a timely filed petition for rehearing, Respondent argues that Petitioner's motion for reconsideration did not toll the commencement of that period. Br. in Opp. 7. Respondent argues that there is a lack of authority for reconsideration of a petition for leave to appeal, causing Petitioner to file a document styled "Motion for Leave to File a Motion to

Reconsider", which was not itself a motion for reconsideration, but contemplates the filing of a further motion for reconsideration if leave is granted. Br. in Opp. 7 – 8. Respondent fails to advise this Court is that this is the procedure established by the Illinois Supreme Court under its rules for seeking reconsideration of a denial of a petition for leave to appeal. The procedure is to simultaneously file a motion for leave to file a motion for reconsideration, with the motion for reconsideration, and the supporting memorandum of law, as provided in Illinois Supreme Court Rule 361 (Ill. S. Ct. R. 361) and the decisions of the court. *Johnson v. Colley*, 111 Ill.2d 468 (1986). *Johnson* succinctly addresses the authority and the process for reconsideration of a denial of a petition for leave to appeal.

> . . . consistent with precedent, this court, on several occasions, has allowed a motion filed in accordance with Rule 361 for *leave to file a motion for reconsideration.* That procedure was followed here, and the motion for reconsideration was allowed.

Johnson, 111 Ill.2d at 472 (citations omitted, italics added).

Although the authorization for this procedure was cited in the Illinois proceeding as the basis for Petitioner's motion to reconsider, (see Pet. Reply App. 5a) Respondent failed to so advise this Court. Respondent further misleads this Court by implying that the actual motion to reconsider was not before the state court, but would be a further filing if the initial filing were granted. Br. In Opp. 7-8. Petitioner timely followed the court's established procedure for seeking reconsideration.

The court order denying the petition for leave to appeal stated that the mandate was to issue on June 15, 2006. Pet. App. 190a. On June 14, 2006, Petitioner simultaneously filed with the court the motion for leave to file a motion for reconsideration, the motion for reconsideration, and the supporting memorandum of law. Pet. Reply App. 1a, 5a, 11a. As provided under Rule 361, Respondent filed a response on

June 26th. The court twice granted Petitioner leave to file supplements to the merits of the motion for reconsideration, on July 5th and again on July 11th, with the Petitioner later submitting 20 copies of the Ninth Circuit's decision in *Davel,* as directed by the court. Pet. App. 186a – 189a. The court stayed its mandate from June 15th until it issued its order denying Petitioner's motion on July 20th (Pet. Reply App. 52a), confirming that the court suspended the finality of its previous order pending its further determination of whether it should be modified. The petition for certiorari was filed within 90 days of the July 20th order.

A timely petition for rehearing raises the question of whether the court will modify the judgment and alter the parties' rights. It operates to suspend the finality of the judgment pending the court's determination. While the court is considering whether rehearing should be granted, there is no judgment to review. *Hibbs v. Winn,* 542 U.S. 88, 97 – 98 (2004). Under Supreme Court Rule 13.1, a petition for writ of certiorari is timely if filed with the Clerk of the Court within 90 days after entry of an order denying discretionary review of the state court of last resort. Sup. Ct. R. 13.1. If a petition for rehearing is timely filed in the lower court, the time to file the petition for writ of certiorari runs from the date of the denial of rehearing. Sup. Ct. R. 13.3. Although the Illinois Supreme Court stylizes the procedure as a motion for leave to file a motion to reconsider, much like it requires a petition for leave to appeal, this is the established procedure. The only difference between *Johnson* and the instant case is that the court granted the motion in *Johnson* and denied it here.

Supreme Court Rule 13.3 does not treat an order denying a petition for rehearing different from a judgment on rehearing for the purpose of the time in which to file a petition for writ of certiorari. The petition was timely filed.

II. THIS COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICTS OVER WHETHER REFUNDS ARE AVAILABLE FOR

ESTABLISHED VIOLATIONS OF THE COST-BASED RATE REQUIREMENT OF SECTION 276 OF THE TELECOMMUNCATIONS ACT.

A. There Is an Irreconcilable Conflict Between the Ninth Circuit Decision in *Davel* and the Illinois Court's Decision.

Respondent contends that this case does not constitute a conflict with *Davel* because 1) the Ninth Circuit was only concerned with the FCC's Waiver Order[5], and 2) the Waiver Order only applied to carriers that filed new tariffs during a 45-day waiver period, which did not include Respondent. Br. in Opp. 9 – 10. Neither component withstands scrutiny.

1. The primary holding of the Ninth Circuit is that the filed-rate doctrine does not bar refunds to enforce the command of the very regulatory statute that gives rise to the tariff-filing requirement, even if the effect is to change the filed rate. *Davel*, 460 F.3d at 1085. Although the filed-rate doctrine may bar common law claims, it does not preclude claims and defenses accorded by the statute itself. *Id.*, citing *Reiter v. Cooper*, 507 U.S. 258, 266 (1993). "'Carriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it, and their failure to do so may justify departure from the filed rate.'" *Davel*, 460 F.3d at 1085 quoting *ICC v. Transcon Lines*, 513 U.S. 138, 147 (1995). The command of Section 276 and the regulations requiring rates to meet the new services test "are accorded by the regulating statute which imposed the tariff requirement and (their enforcement) are therefore not precluded by the filed-rate doctrine." *Davel*, 460 F.3d at 1085. In holding that refunds are not barred, the Ninth

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[5] Order, DA 97-805, 12 F.C.C.R. 21370 (Com. Car. Bur. Released April 15, 1997) referred to in the petition for certiorari as the Bureau Clarification Order, in *Davel* as the Waiver Order, and by Respondent as the Limited Waiver Order.

Circuit squarely conflicts with the holding of the Illinois court.

Respondent's brief only refers to the Ninth Circuit's analysis of the FCC's Waiver Order. That analysis was noted by the court as an additional "related reason" that refunds are not barred. Nothing in Respondent's argument even addresses *Davel's* primary holding, because the conflict between *Davel* and the Illinois decision is irreconcilable.

2. Respondent unsuccessfully attempts to distinguish *Davel's* holding as to the Waiver Order. Respondent argues that refunds under the FCC order would only occur if the carrier filed new tariffs during the FCC's 45 day extension of the April 15, 1997 deadline, and that Respondent failed to file any new tariffs during this time. Br. in Opp. 10. However, the carrier in *Davel* also did not file any new tariffs during this timeframe. *Davel*, 460 F.3d at 1080, 1088. Even this attempt to avoid *Davel* fails. Despite its desperate efforts to distinguish the indistinguishable, Respondent cannot avoid the conflict. Under these decisions, where the tariffed rate exceeds the cost basis required by the new services test, refunds would be available in the 11 states governed by *Davel*, while in Illinois, and some other states, refunds for the same violation of federal law are barred. This conflict is a classic reason for granting certiorari.

B. The Illinois Decision Contravenes This Court's Precedents.

Respondent argues that the Illinois court followed this Court's opinion in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) that where a regulator, after a hearing, approves a tariffed rate, by virtue of the order that rate becomes the lawful rate. Respondent claims that since the ICC approved Respondent's tariff as reasonable under the state statute in 1995, 1) Respondent was entitled to rely upon that declaration so long as the order remained in effect, and 2) the regulator cannot change its decision retroactively. Br. in Opp. 12. But, like the Illinois court,

Respondent errs in failing to correctly apply this Court's holding under the facts of the case.

1. The ICC 1995 order was no longer in effect after the FCC expressly preempted all state regulations that did not require cost-based rates to be in effect no later than April 15, 1997.[6] As recognized by the Michigan Appellate Court[7], any tariff approved prior to April 15, 1997 that violated the new services test was preempted. Carriers were not entitled to rely on any such tariff, the existence of which did not preclude the ordering of refunds. *SBC Michigan v. Michigan Public Service Commission,* Pet. App. 180a – 181a. Although the FCC's express preemption was repeatedly emphasized in the Illinois proceedings, neither the ICC nor the Illinois court even attempted to distinguish its application. They simply ignored it.

Not only was Respondent not entitled to rely on the ICC's previous order, Respondent in fact did not rely on it. Respondent filed its own analysis of its rates on May 15, 1997 and self-certified that its rates complied with the FCC's requirement, not the ICC's 1995 order, thereby enabling Respondent to collect hundreds of millions of dollars in federal dial around compensation. The only ICC hearing conducted to determine if Respondent's tariffed rates complied with the federal requirement is the instant case, where the ICC found that they did not. This Court has consistently ruled that when a carrier makes its own determination that its rates comply with the statutory requirements, and it is later found that those rates failed to comply, reparations may be awarded. *Arizona Grocery,* 284 U.S. at 384-85, 388, 390; *Maislin Ind., U.S., Inc. v. Primary*

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[6] *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Report and Order, 11 F.C.C.R. 20541, ¶¶ 146-147 (1996) ("*First Payphone Order*").

[7] This Section 276 refund proceeding involved Respondent SBC Illinois' sister company, SBC Michigan.